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AND
PROMISSORY NOTES.

By **SIR JOHN BAYLEY, KNT.**
ONE OF THE JUSTICES OF HIS MAJESTY'S COURT OF KING'S BENCH.

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Most of the new cases in this edition have been supplied by the Author; but, the Editor has made alterations and additions in various parts of the work, particularly in the Tenth Chapter, which he has nearly re-written.

Lincoln's Inn, 1830.



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ERRATA.

- Page 77. first line of n. (3), for "60," read "77."
 — 310. second par. line third, for "entled," read "entitled."
 — 345. first line of notes, for "Alders," read "Creswell."
 — 418. note (14), for "7 Tr." read "7 T. R."
 — 422. last line of the text, for "32," read "52."
 — 513. n. (54), add "same point ruled in *Greenland v. Dyer*,
 2 Mann. & R. 422."
 — 536. first line of notes, for "Jones," read "Longes."

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A

SUMMARY OF THE LAW OF

BILLS OF EXCHANGE

AND

PROMISSORY NOTES.

C A P. I.

- SECT. 1. *What a Bill or Note is.*
2. *An Order or Promise, p. 4.*
 3. *In Writing, p. 10.*
 4. *For Payment of Money, p. 10.*
 5. *To what Amount, p. 12.*
 6. *Absolutely and at all Events, p. 16.*
 7. *Date, p. 25.*
 8. *Place of Making, p. 26.*
 9. *Place of Payment, p. 29.*
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 11. *Signature, p. 37.*
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 13. *Expressing Value received, p. 40.*
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 15. *Legal Obligation of a Bill or Note, p. 43.*

A BILL of Exchange is a written order or request and a Promisory Note a written promise, for the payment of money absolutely and at all events; the one owing its existence and privileges to the law and custom of merchants, the other to the 3d and 4th Anne, c.9. (1)

(1) Before the statute of Queen Anne many attempts were made to put promissory notes on the footing of bills of

The person who makes a bill is called the Drawer, the person to whom it is addressed the

exchange, but without success : vide *Pearson v. Garrett*, 4 Mod. 242. *Clerke v. Martin*, Lord Raym. 757. Salk. 129. *Burton v. Souter*, Lord Raym. 774. and *Williams v. Cutting*, Lord Raym. 825. Salk. 24. 7 Mod. 154. 11 Mod. 24. and see 4 Term Rep. 151, 152.

‘ By the 3d and 4th Anne, c. 9. § 1. Whereas it hath been held, that notes in writing, signed by the party who makes the same, whereby such party promises to pay unto any other person, or his order, any sum of money therein mentioned, are not assignable or indorsable over, within the custom of merchants, to any other person; and that such person to whom the sum of money mentioned in such note is payable, cannot maintain an action by the custom of merchants against the person who first made and signed the same; and that any person to whom such note should be assigned, indorsed, or made payable, could not within the said custom of merchants maintain any action upon such note against the person who first drew and signed the same:’ Therefore, to the intent to encourage trade and commerce, which will be much advanced, if such notes shall have the same effect as inland bills of exchange, and shall be negotiated in like manner: Be it enacted, that all notes in writing, that after the 1st day of May, in the year of our Lord 1705, shall be made and signed by any person or persons, body politic or corporate, or by the servant or agent of any corporation, banker, goldsmith, merchant or trader, who is usually intrusted by him, her or them, to sign such promissory notes for him, her or them, whereby such person or persons, body politic and corporate, his, her or their servant or agent as aforesaid, doth or shall promise to pay to any other person or persons, body politic and corporate, his, her or their order, or unto hearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to any such person or persons, body politic and corporate, to whom the same is made payable, and also every such note payable to any person or persons, body politic and corporate, his, her or their order, shall be assignable or indorsable over,

Sect. 1.] *What a Bill or Note is.* Art. 3

Drawee, and the person in whose favour it is made the Payee.

If the Drawee accept the bill, he is called the Acceptor.

The person who makes a note is called the Maker, and the person to whom it is payable, the Payee.

When a bill or note is indorsed, the person indorsing it is called the Indorser, the person to whom it is indorsed, the Indorsee.

A note while in the hands of the payee has this resemblance to a bill, that it is for the payment of money absolutely and at all events, and when transferred it is exactly similar to a bill of exchange. (2)

in the same manner as inland bills of exchange are or may be, according to the custom of merchants; and that the person and persons, body politic and corporate, to whom such sum of money is or shall be by such note made payable, shall and may maintain an action for the same, in such manner as he, she or they might do, upon any inland bill of exchange, made or drawn according to the custom of merchants, against the person or persons, body politic and corporate, who, or whose servant or agent as aforesaid, signed the same; and that any person or persons, body politic and corporate, to whom such note, that is payable to any person or persons, body politic and corporate, his, her or their order, is indorsed or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, shall and may maintain his, her or their action for such sum of money, either against the person or persons, body politic and corporate, who, or whose servant or agent as aforesaid, signed such note, or against any of the persons who indorsed the same, in like manner as in cases of inland bills of exchange.

(2) In *Heylin v. Adamson*, Burr. 669, the question was whether the indorsee of a bill was bound to make a demand

Sect. 2. — No particular (3) words are necessary to make a bill or note; but it must be a written order or promise which from the time of making it cannot be complied with or performed without the payment of money.

upon the drawer as the indorsee of a note must upon the maker, and per Lord Mansfield, "while a note continues in its original shape of a promise from one man to another, it bears no similitude to a bill; but when it is indorsed, the resemblance begins; for then it is an order by the indorser upon the maker to pay the indorsee, which is the very definition of a bill: the indorser is the drawer, the maker of the note the acceptor; and the indorsee, the person to whom it is made payable; and all the authorities, and particularly Lord Hardwicke, in a case of *Hamerton v. Mackarell*, M. 10 Geo. II. put promissory notes on the same footing with bills of exchange." And in *Brown v. Harraden*, 4 Term Rep. 148, where the court decided that three days' grace should be allowed on promissory notes, Lord Kenyon observed, that the effect of the statute was, that notes were wholly to assume the shape of bills; and Buller J. added, that the cases cited in the argument showed clearly, that the Courts of Westminster had thought the analogy between bills and notes so strong, that the rules established with respect to the one ought also to prevail as to the other; that the language of the preamble of the Act was express, that it was the object of the legislature to put notes exactly on the same footing with bills, and that the enacting part pursued that intention. The same doctrine is to be found in *Carlos v. Faneourt*, 5 Term Rep. 482. *Edie v. East India Company*, Burr. 1224.

(3) D. Lord Raym. 1397. Str. 629. 8 Mod. 364.

Chadwick v. Allen, Str. 706. A note was in these words: "I do acknowledge that Sir Andrew Chadwick has delivered me all the bonds and notes, for which 400*l.* were paid him on account of Col. Synge, and that Sir Andrew delivered me Major Graham's receipt and bill on me for 10*l.* which 10*l.*

Thus an order or promise to (4) deliver, or that I. S. (5) shall receive, money, or to be (6) accountable or (7) responsible for it to him or order, is a good bill or note.

But a mere (8) acknowledgment of a debt without any promise to pay, is not a bill or note.

"and 15*l.* 5*s.* balance due to Sir Andrew I am still indebted, "and do promise to pay," and upon demurrer to the declaration, the court held it a note within the statute.

(4) D. acc. Lord Raym. 1397.

(5) D. 8 Mod. 364.

(6) *Morris v. Lea*, Lord Raym. 1396. Str. 629. 8 Mod. 326. Plaintiff sued as indorsee upon a note by which the defendant promised to be accountable to A. or order for 100*l.* value received; and after verdict for the plaintiff it was insisted in arrest of judgment, that this was not a negotiable note; sed per cur., "no precise words are necessary to be used in a bill or note: " 'Deliver such a sum' makes a good bill; by receiving the value "the defendant becomes a debtor, and when he promises to be "accountable for it to A. it is the same as a promise to pay to A. "and it is the stronger, because it is to be accountable to A. or "order; and it would be an odd construction to expound the "word accountable, to give an account, when there may be "several indorsees. Judgment for plaintiff."

(7) D. 8 Mod. 364.

(8) *Fisher v. Leslie*, 1 Esp. N. P. C. 426. An unstamped slip of paper with "I. O. U. eight guineas," written upon it, and signed by the defendant, was offered in evidence under the money counts, and objected to as being either a promissory note or a receipt, and therefore requiring a stamp; but Lord Kenyon held that it was neither a promissory note nor a receipt, and received it in evidence. So *Childers v. Boulnois*, cor. Abbott C. J. March 1822. 1 Dowling's Nisi Prius, 8. Two unstamped pieces of paper, with "I. O. U. 400*l.*" and "I. O. U. "250*l.*," signed by defendant, were offered in evidence, and objected to, as being either promissory notes or receipts, and

So in a written bargain for buying goods, a promise to pay the seller the price in a limited time is not a promissory note. (9)

And a paper importing to desire payment as matter of favour, not as matter of right, is not a bill. (10)

A note was (11) in these words: "Borrowed of "I. S. 50*l.* which I promise *not* to pay;" and per Lord Macclesfield, "the word *not* shall be rejected,

therefore requiring stamps: but Abbott C. J. thought they were neither, and that he was bound to receive them, and they were received accordingly; but the jury found for defendant. But see *Guy v. Harris*, sittings after Easter Term, 1800, cor. Lord Eldon C. J. *contra*, Chitty 243. n.

(9) *Ellis v. Ellis*, Gow, 216. An agreement was in these words: "I, R. E., do this day bargain and agree with my uncle, "W. E., to give him 5*l.* for a cart for the use of my father; and "do hereby promise and agree to pay him, the said W. E., with- "out fail, in three weeks from the date hereof. R. E." Dated, &c. In an action upon this instrument it was insisted it was a promissory note, and required a note stamp: but Richardson J. held it an agreement, not a note.

(10) *Little v. Slackford*, 1 Moody & M. 171. Defendant gave J. S., to whom he was indebted, a note, addressed to plaintiff, as follows: "Mr. Little, please to let the bearer have 7*l.*, and "place it to my account, and you will much oblige your humble "servant, J. Slackford." Plaintiff paid the money, and sued defendant for money paid. He produced this paper: defendant insisted it was a bill of exchange, and required a stamp. Lord Tenterden held it no bill: it did not import to be a demand by a person having right to require, but rather seemed a request, as matter of favour, by one who had no right to demand.

(11) Cited per Lord Mansfield in *Russell v. Langstaffe*. B. R. M. 21 Geo. III. and in *Peach v. Kay*, sittings after Tr. 1781, and per Lord Hardwicke, 2 Atk. 32.

“ for a man shall never say, I am a cheat and have “ defrauded.”

An order to pay money will be a bill, though instead of the ordinary direction to the drawers, the word “*at*” be prefixed to their names. (12)

Especially if from fraud it be written in such a manner as to be intended to escape observation, and to make the instrument pass as a bill. (13)

Such an order is not a promissory note. (14)

(12) *Shuttleworth v. Stevens*, 1 Campb. 407. In an action against defendant as drawer of a bill, the instrument was in this form: “ Two months after date pay to the order of J. J. 78*l.* 11*s.* “ value received, T. S.—at Messrs. John Morson and Co.” Lord Ellenborough held this was properly declared on as a bill of exchange, and plaintiff had a verdict.

(13) *Allan v. Mawson*, 4 Campb. 115. In an action against defendant as drawer of a bill, the instrument was as follows: “ Two months after date pay L. H. or order 40*l.* value received, “ G. M. @ Jno. Perring and Co’s.” The “*at*” was in very small letters in the hook of the S. Plaintiff presented it for acceptance, and on refusal brought this action within the two months; the question was, whether plaintiff was entitled to treat this as a bill of exchange, and Gibbs C. J. thought he would have been on the authority of *Shuttleworth v. Stevens*, 1 Campb. 407. had the word “*at*” been distinctly written; but he left it to the jury whether it was not fraudulently written, to escape detection, and to induce a belief that the instrument was a bill; the jury thought it was, and found for plaintiff.

(14) *Rex v. Hunter*, Pasch. 1823. Prisoner was indicted for forging and uttering a promissory note, and the indictment set out the note as follows: “ Newport, Nov. 20. 1821. Two months “ after date pay Mr. B. Hobday or order 28*l.* 15*s.* value received. “ Jno. Jones: At Messrs. Spooners and Co. bankers, London.” After conviction, Holroyd J. stated a case for the consideration of the Judges, whether this was rightly called a promissory

An order will be a bill, though it be addressed, not to any particular person, but merely to a particular house ; (15)

At least as against a person who accepts it. (15)

The order may be addressed to the person making it, in other words, a man may draw upon himself; but in legal operation it is rather a note than a bill. (16)

note ; and on consideration five Judges out of seven who met, viz. Abbott C. J., Bayley, Park, Holroyd, and Burrough Js., held it a bill, not a note, Graham and Hullock Barons doubting ; and a pardon was recommended.

(15) *Gray v. Milner*, 8 Taunt. 739. In an action against defendant as acceptor of a bill, the instrument was as follows : " May 20. 1813. Two months after date pay to me or my order the sum of 30*l.* 2*s.* W. S. Payable at No. 1. Wilmot Street, opposite the Lamb, Bethnal Green, London." Defendant accepted it, and plaintiff was indorsee : it was objected that this was not a bill ; but on point saved, and time to consider, the Court were clear it was ; that the direction to the place could only mean to some person who resided there, and defendant by his acceptance acknowledged that he was the person to whom it was directed. Judgment for plaintiff.

(16) *Starke v. Cheeseman*, Tr. 11 W. III. Carth. 509. Christopher Cheeseman being in Virginia, drew upon Christopher Cheeseman in Ratcliffe, which in truth was himself ; and an action being brought against him upon the bill, he suffered judgment by default, without taking any objection on this ground, though he did upon others, and the plaintiff had judgment.

Dchers v. Harriot, Tr. 2 W. & M. 1 Show. 163. A. drew a bill payable by himself in Dublin ; an action was afterwards brought thereon, and the plaintiff recovered.

Robinson v. Bland, Burr. 1077. The defendant, being at Paris, drew a bill for 672*l.* on himself in London ; the consideration was partly money lost at play in Paris, and partly money

Where an instrument is so framed as to admit of reasonable doubt whether it was intended for a bill or note, the holder may, as against the maker, treat it as either. (17)

And it is not competent for the maker to say the holder has done wrong. (17)

An instrument, which contains words of promise from the maker as though it were a note, is not the less so, because it has upon it the name and address of a third person in the place where the name and address of the drawee of a bill would be, and though such person afterwards write upon it what, if it were a bill, would be an acceptance; for, in its

lent at the time and place of play, and upon that ground a case was reserved for the opinion of the court; but no objection was made that the defendant drew the bill upon himself.

Joselyn v. Laserre, Fort. 282. A man may draw a bill upon himself. See also Mar. 3.

(17) *Edis v. Bury*, 6 Barn. and Cr. 433. an instrument was in these words: "London, 5th August, 1826. Three months after date I promise to pay John Bury or order 4*l.* 1*1s.* 5*d.* value received.

"John Bury."

"J. B. Grutherot, 35. Mountague

"Place, Bedford Square.

Grutherot's name was written across it: in assumpsit for cattle sold, defendant proved that he gave this instrument to plaintiff for the price, and insisted that for want of notice of its dishonour it operated as payment. This depended upon the question whether this was a bill or note, and that point Lord T. saved: but on motion for nonsuit, the Court thought it a note; but they also held, that as against defendant who made it, if he made it in a doubtful form, plaintiff was at liberty to treat it either as a bill or note, and a rule was refused.

creation it is a note, and subsequent acts will not make it a bill. (17)

Sect. 3. — Though a bill or note, or an indorsement thereon, must be in writing, such writing need not be in ink. (18)

A writing in pencil is sufficient. (18)

Sect. 4. — Bills and notes must be for the payment of money only ; an order or promise to pay money *and do some other act* is not a bill or (19) note.

And they must be for the payment of money in specie : an order or (20) promise to pay money “ in good East India bonds ;” or to pay “ in cash or

(18) *Geary v. Physic*, 5 Barn. & Cr. 234. In an action by plaintiff as indorsee of a note, it appeared that the indorsement was in pencil ; and it was insisted that such an indorsement was not within the custom of merchants as to bills of exchange. Abbot C. J. thought it sufficient, but saved the point ; and on R. N. for nonsuit and C. S. he observed that there was no authority that where the law requires a contract to be in writing that writing must be in ink ; and in the absence of any authority to say with what material the writing should be, the Court thought they could not say that a writing in pencil was not sufficient. Rule discharged

(19) *Martin v. Chauntry*, Str. 1271. on error from the Court of Common Pleas, the Court of King's Bench held that a written promise “ to deliver up horses and a wharf, and pay money at a “ particular day,” was not a note within the statute, and reversed the judgment which had considered it as such.

(20) *Anon. Buller's Ni. Pr.* 272. a written promise to pay 300*l.* to B. or order, “ in three good East India bonds,” was held not to be a note within the statute.

Bank of England notes" (21), is not a bill or note.

And they must be for a specific amount. A bill or note for a given sum, "and for whatever else may be due to the payee," is not, even between the original parties, a bill or note. (22)

Nor is it good for the sum it specifies. (22)

But an order or promise to pay so many "pound" instead of "pounds" is a bill or note. (23)

(21) *Ex parte Imeson*, Hil. 1815, 2 Rose, 225. Case from Chancery, on the question, whether a country bank was debtor to the holder of certain of their notes, which he had taken from third persons, not from the bank; the notes were for payment some of five guineas, some of one guinea, "in cash or bank of "England notes;" and after argument the Court held the bank not debtor to this holder, for these notes were not within the statute, because a delivery of bank notes, which might be of less value than cash, would satisfy them, and they were not absolutely and at all events for payment of money in specie.

S. P. ex parte Davison, Buck, 31.

Rex v. Wileox, Easter, 1808. Indictment for forging and uttering a promissory note; the note was to "pay the bearer on "demand one guinea in cash or Bank of England notes." A case was reserved for the consideration of the twelve Judges, on the question, whether this was a note within the statute; a majority of them held it was not; and upon a representation to the crown, the prisoner was pardoned.

(22) *Smith v. Nightingale*, 2 Stark. 375. Defendant gave Eastling this note: "I promise to pay James Eastling, my head "carter, 65*l.*, with lawful interest for the same, three months "after date, *with all other sums that may be due to him.*" Eastling's administratrix sued thereon. Lord Ellenborough thought it no note, even for the 65*l.*, but an agreement, and it not having an agreement stamp, he nonsuited the plaintiff.

(23) *Rex v. Post*, Pasch. 1806. Prisoner altered a note for one pound into a note for ten, by substituting ten for one before

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Sect. 5. — Negotiable bills or notes made in England for less than (24) twenty shillings are void; and all negotiable bills or notes made in England (except drafts or orders by a man upon his banker, or person acting as banker,) for twenty shillings and less than (25) five pounds, unless made conformably

the word "Pound" in the body of the note, and also in the corner. It was urged that a note for payment of ten *pound* was not a money note. On a case reserved, the Judges were clear that it was, and that a capital conviction of the prisoner for forgery was right.

(24) By 48 Geo. III. c. 88. s. 2. it is enacted, "that all promissory or other notes, bills of exchange, or drafts, or undertakings in writing, being negotiable or transferable for the payment of any sum or sums of money, or any orders, notes, or undertakings in writing, being negotiable or transferable for the delivery of any goods, specifying their value in money, less than the sum of twenty shillings in the whole, heretofore made or issued, or which shall hereafter be made or issued, shall, from and after the 1st day of October, 1808, be, and the same are hereby declared to be, absolutely void and of no effect; any law, statute, usage or custom, to the contrary thereof in any wise notwithstanding."

(25) By 17 Geo. III. c. 30. s. 1. made perpetual by 27 Geo. III. c. 16., it is enacted, that all promissory or other notes, bills of exchange or drafts, or undertakings in writing, being negotiable or transferable, for the payment of twenty shillings or any sum of money above that sum and less than five pounds, or on which twenty shillings or above that sum and less than five pounds shall remain undischarged, and which shall be issued within that part of Great Britain called England, at any time after the 1st day of January, 1778, shall specify the names and places of abode of the persons respectively to whom, or to whose order, the same shall be made payable, and shall bear date before or at the time of drawing or issuing thereof, and not on any day subsequent thereto, and shall be made payable

with certain regulations, are also void; and the person issuing or negotiating them, in case they are

within the space of twenty-one days next after the day of the date thereof; and shall not be transferable or negotiable after the time thereby limited for payment thereof; and that every indorsement to be made thereon shall be made before the expiration of that time, and bear date at, or not before, the time of making thereof; and shall specify the name and place of abode of the person or persons to whom, or to whose order the money contained in every such note, bill, draft, or undertaking, is to be paid; and that the signing of every such note, bill, draft, or undertaking, and also of every such indorsement, shall be attested by one subscribing witness at the least; and which said notes, bills of exchange, or drafts, or undertakings in writing, may be made or drawn in words to the purport or effect as set out in the schedule hereunto annexed, No. 1. and 2. And that all promissory or other notes, bills of exchange, or drafts, or undertakings in writing being negotiable or transferable, for the payment of twenty shillings, or any sum of money above that sum and less than five pounds, or on which twenty shillings, or above that sum and less than five pounds, shall remain undischarged, and which shall be issued within that part of Great Britain called England, at any time after the said 1st day of January, 1778, in any other manner than as aforesaid; and also every indorsement on any such note, bill, draft, or undertaking, to be negotiated under this act other than as aforesaid, shall be, and the same are hereby declared to be, absolutely void.

SCHEDULE,

No. 1.

(Place) (Day) (Month) (Year)

" Twenty-one days after date, I promise to pay to A. B. of
" (place) or his order, the sum of for value received by

" Witness, E. F.

" C. D."

And the Indorsement, toties quoties.

(Day) (Month) (Year)

" Pay the contents to G. H. of (place) or his order,

" Witness, I. K.

" A. B."

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under twenty shillings, is (26) liable to a penalty not exceeding 20*l.*, nor less than 5*l.*; and in case they are between 20 shillings and 5*l.*, to a penalty of 20*l.*

These regulations are, that they specify the name and place of abode of the person to whom or to

No. 2.

(Place) (Day) (Month) (Year)

" Twenty-one days after date, pay to A. B. of (place) or his order, the sum of value received, as advised by

" To E. F. of (place) " C. D."

" Witness, G. H.

And the Indorsement, toties quoties.

(Day) (Month) (Year)

" Pay the contents to I. H. of (place) or his order,

" Witness L. M. " A. B."

By 7 Geo. IV. c. 6. s. 4. if any body politic or corporate, or person or persons, in England, shall, after 22d March, 1826, publish, utter, or negotiate any promissory or other note, (not being a note payable to bearer on demand as therein before mentioned, and which were allowed in given cases till 5th April, 1829, but not afterwards,) or any bill of exchange, draft, or undertaking in writing, being negotiable or transferable for payment of 20*s.* or above that sum and less than 5*l.*, or on which 20*s.* or above that sum and less than 5*l.* shall remain undischarged, made, drawn, or indorsed in any other manner than is directed by 17 Geo. III., every such body politic, &c. shall forfeit and pay the sum of 20*l.*

Provided by s. 9. that nothing herein contained shall extend to any draft or order drawn by any person on his banker, or on any person acting as such banker, for payment of money held by such banker or person to the use of the person by whom such draft or order shall be drawn.

(26) By 48 Geo. III. c. 88. s. 3. where the bill or note is for less than twenty shillings; and by 17 Geo. III. c. 30. s. 2. where it is for less than five pounds.

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whose order they are made payable; that they be attested by one subscribing witness; that they bear date at or before the time when they are issued; and be made payable within twenty-one days after the date.

These provisions were, by 7 Geo. IV. c. 6. s. 2., suspended as to notes of bankers and others duly licensed, and stamped before the 5th of February, 1826, and as to Bank notes stamped before the 10th of October, 1826, so as they were not issued or re-issued after the 5th of April, 1829; but from the 5th of April, 1829, the issuing or re-issuing them subjects the party to a penalty of 20*l.* for each note. (27)

And the uttering or negotiating in England of any negotiable note, draft, or undertaking in writing for payment to the bearer on demand of any sum less than 5*l.*, or on which less than 5*l.* shall remain undischarged, though the same were made or issued, or purport to have been made or issued in Scotland or Ireland, will subject the party to a penalty not exceeding 20*l.* nor less than 5*l.*, to be recovered in a summary way before one or more justices, and with a power of remitting or mitigating in the Treasury. (28)

(27) 7 Geo. IV. c. 6. s. 3. imposes the penalty of 20*l.* per note for issuing or re-issuing after 5th April, 1829, certain notes therein specified payable to bearer on demand, for sums between 20*s.* and 5*l.* and s. 4. provides for all other bills or notes for similar sums.

(28) 9 Geo. IV. c. 65.

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Sect. 6.— A bill or note must purport that the money mentioned in it shall be payable absolutely and at all events; if it purport to make the payment depend on any uncertainty or contingency, the instrument is not, except in certain cases as to the stamp duties, a bill or note; and if it be not a bill or note *ab initio*, no subsequent (29) event can make it so.

Thus an order or promise to pay money “provided (30) the terms mentioned in certain letters shall be complied with;” “provided (31) I.S. shall not be surrendered to prison within a limited time;”

(29) See *Colehan v. Cooke*, Willes, 393. and *Hill v. Halford*, post, and *Blankenhagen v. Blundell*, post,

(30) *Kingston v. Long*, B. R. M. 25 Geo III. The Plaintiff brought an action as indorsee against the defendant, as acceptor, upon an order importing to be payable, *provided the terms mentioned in certain letters written by the drawer were complied with*, and the Court held clearly that the plaintiff could not recover, though the acceptance admitted a compliance with the terms; for, the order was no bill until after such compliance, and if it were not a bill when drawn, it could not afterwards become one.

(31) *Smith v. Boheme*, 3 Lord Raym. 67. cit. Lord Raym. 1362. 1396. Action by payee against the makers upon a note promising to pay plaintiff or order on demand 71*l.* 12*s.* 10*d.* “or to surrender the body of Samuel Boheme in an action brought against him by plaintiff.” Verdict for the plaintiff and judgment; and on error brought in the King’s Bench, the Court held that this was not a note within the statute, because the money was not absolutely payable, but depended upon the contingency whether the defendants should surrender Samuel Boheme to prison; and the judgment was reversed, 9th of June, 1724.

“provided (32) I. S. shall not pay the money by a particular day ;” “provided (33) I. S. shall leave me sufficient, or I shall otherwise be able to pay it ;” or “when I. S. (34) shall marry ;” is, on ac-

(32) *Appleby v. Biddulph*, cit. 8 Mod. 363. 4 Vin. 240. pl. 16. An action was brought on this note, “I promise to pay to T. M. 50*l.* if my brother doth not pay it within six weeks ;” and after verdict for the plaintiff, the court arrested the judgment, because the maker was only to pay it on a contingency.

Ferris v. Bond, B. R. Trin. 2 Geo. 4. A note was in these words, “I John Connor promise to pay John Ferris or his order 50*l.* with interest, at six months’ notice, dated 24th of June, 1808. (Signed) I. Connor.—Or else Henry Bond.” In an action upon this against Bond, the question was reserved whether this was, as to Bond, a note within the statute ; and the court after argument held it was not, because Bond’s engagement was only to pay if Connor did not ; and a rule for a nonsuit was made absolute.

(33) *Roberts v. Peake*, Burr. 323. The plaintiff as indorsee of a note sued one of the makers ; the instrument was in these words: “We promise to pay A. B. 116*l.* 11*s.*, value received, on the death of George Henshaw, provided he leaves either of us sufficient to pay the said sum, or if we shall be otherwise able to pay it ;” and upon a case reserved, the court held it was not a negotiable note, because it was payable eventually and conditionally only, and not absolutely and at all events, and a nonsuit was entered. See *Williamson v. Bennett*, post.

(34) *Beardsley v. Baldwin*, Str. 1151. A note to pay money within so many days after the defendant should marry, was (on consideration) held not to be a negotiable note ; and in *Pearson v. Garrett*, Comb. 227. and 4 Mod. 242. (which, however, was before the statute,) an action having been brought upon a note by which the defendant promised to pay the plaintiff sixty guineas if he, the plaintiff, should be married within two months, the court inclined against the note, because it was to pay money on a mere contingency, and judgment was given on demurrer for the defendant.

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count of the contingency to which the payment is subjected, neither a bill nor a note.

So, an order or promise to pay "out of my (35) growing subsistence," or "out of the (36) "fifth payment when due," or "out of (37) money "when received," is, on account of the uncertainty

(35) *Jocelin v. Laserre*, Fort. 281. 10 Mod. 294. 316. Evans drew upon Jocelin, and required him to pay Laserre 7*l.* a month "out of Evans's growing subsistence," and Jocelin accepted the draft. Laserre sued Jocelin, and had judgment, but upon a writ of error that judgment was reversed, because this draft was not a good bill of exchange, inasmuch as it would not have been payable had Evans died, or had his subsistence been taken away.

(36) *Haydock v. Linch*, Lord Raym. 1563. Rogers drew upon Linch and requested him to pay Haydock 14*l.* 3*s.* "out of the fifth payment when it should become due, and it should be allowed by Rogers." Linch accepted the draft, and Haydock sued him, but the court, on demurrer to the declaration, held this was no bill of exchange, and gave judgment for the defendant.

(37) *Dawkes v. Lord Deloraine*, Blackst. 782. 3 Wils. 207. A draft was in these words: "8th of January, 1768, Seven "weeks after date, pay Mrs. Dawkes 32*l.* 17*s.* out of W. Steward's money as soon as you shall receive it, for your humble "servant, Deloraine. To Timothy Brecknock, Esq." Brecknock accepted the bill, but it not being paid, Mrs. Dawkes brought an action upon it against Lord Deloraine, who pleaded that Brecknock had not received W. Steward's money, and upon demurrer to his plea, insisted that this was not a bill of exchange. The court, after argument, held the objection good; because it was payable out of a particular fund, and on an event which was future and contingent, viz. the receipt of W. Steward's money, whereas a bill ought to be subject to no event or contingency, except the failure of the general personal credit of the persons drawing or negotiating it. In *Wilson*, 162, is a report from hearsay, of a determination that a promise to

whether the subsistence or payment will become due, or the money be received, neither a bill nor a note.

So, an order to pay a sum "out of (38) rents," or (39) "out of other money in the hands of the "person to whom it is addressed," is no bill; because, he may not have rent or other money in his hands sufficient to discharge it.

So, a promise to pay (40) "on the sale or pro-

pay a sum of money, "on the receipt of the payee's wages due "from a ship in government service," was a good note; but that may perhaps be questioned, because the maker might never receive the wages.

(38) Lord Raym. 1362. Str. 592. Fort. 282.

(39) *Jenny v. Herle*, Lord Raym. 1361. 8 Mod. 265. Str. 591. Herle sued Jenny upon a bill drawn by him upon Pratt, and payable to Herle to this effect: "Sir, you are to pay Mr. Herle "194*l.* out of the money in your hands belonging to the pro-
"prietors of the Devonshire mines, being part of the considera-
"tion-money for the purchase of the manor of West Buckland." Herle had judgment in the Common Pleas, but upon a writ of error, the court of King's Bench held this was no bill of exchange, because it was only payable out of a particular fund supposed to be in Pratt's hands, and the judgment was accordingly reversed.

(40) *Hill v. Halford and another in Error*, 2 B. and P. 413. The defendants in Error sued Hill as maker of a note, thereby promising to pay them 190*l.* "on the sale or produce, immedi-
"ately when sold, of the White Hart, St. Alban's, Herts, and the
"goods, &c. value received." The declaration averred a sale of the inn and goods before the commencement of the action. After judgment in K. B. by default, writ of inquiry executed, and general damages recovered, Hill brought a writ of error in the Exchequer Chamber, and the court held that this promise could not be declared on as a note, and therefore reversed the judgment.

“ duce, immediately when sold, of the White Hart
 “ Inn, St. Alban’s, and the goods,” &c. is no note :
 nor would it make any difference though the White
 Hart and goods were sold before the action was
 commenced.

So, an instrument in the form of a note, but with
 a memorandum written upon it, stating that it is
 taken “ for(41)securing the payment of all such ba-
 “ lances as shall be due from one of the makers to
 “ the payee, to the extent of the sum mentioned
 “ therein ;” or “ that if any dispute shall arise re-
 “ specting the subject which is the consideration
 “ for it, it shall be void,” is no note. (42)

(41) *Leeds & al. v. Lancashire*, 2 Camp. N. P. C. 205. The
 defendant, Marriott, and Ball gave a joint and several promis-
 sory note to the plaintiffs for 200*l.* No time for payment was
 mentioned in the note. On the back was written, “ The within
 “ note is taken for security of all such balances as Jas. Mar-
 “ riott may happen to owe to Thos. Leeds and Co. not extend-
 “ ing farther than the within-named sum of 200*l.* ; but this note
 “ to be in force for six months, and no money liable to be called
 “ for sooner in any case.” This memorandum was written be-
 fore the note was signed by the defendant or Ball. It appeared
 in an action upon this note, that in the course of mereantile
 dealings, Marriott had become indebted to the plaintiffs, and
 that on their refusing to deal with him any longer without some
 guaranty, the above instrument, which the makers represented
 to be a note, was given. It had a note stamp. — Lord Ellen-
 borough held that as between the original parties it was an
 agreement, and not a note, and therefore nonsuited the plaintiffs.

(42) *Hartley v. Wilkinson*, 4 Camp. 127. 4 M. & S. 25. A note
 was made payable to Foster or order, for 25*l.* “ being the
 “ amount of the purchase-money for a quantity of fir belong-
 “ ing to Mr. Hartley.” Before the note was signed, this memo-

So, an instrument acknowledging the receipt of drafts for the payment of money, and promising to pay the money specified in the drafts, is (43) not a promissory note ; for, the payment of the money is contingent, it depends upon the drafts being honoured.

random was indorsed upon it : “ This note is given on condition “ that if any dispute shall arise between Mr. Hartley and Lady “ Wray respecting the fir, this note to be void.” In an action upon this note by indorsee against the maker, Lord Ellenborough thought it not a note within the statute, because its payment depended upon there being no dispute between Mr. Hartley and Lady Wray, and he nonsuited the plaintiff. On a motion for a new trial, the court agreed with him, and refused a rule.

(43) *Williamson & al. v. Bennett & al.*, 2 Camp. N. P. C. 417. The defendants were sued upon the following instrument, which was stamped and declared upon as a promissory note : “ Borrowed and received of J. and J. Williamson (the plaintiffs) “ the sum of 200*l.* in three draughts, by W. and B. William- “ son, dated as under, payable to us W. Bennett and S. M. (the “ defendants) on J. and J. Williamson, which we promise to pay “ unto the said J. and J. Williamson, with interest. As witness “ our hands this 26th day of August, 1802.

| | | |
|--------------|-----------------------|------|
| “ August 26, | 1 draught at 2 months | £120 |
| “ _____ | 1 do. _____ | 30 |
| “ _____ | 1 do. _____ | 50 |
| | | £200 |

(Signed by the defendants.)

Lord Ellenborough held that this was not a promissory note. He said there could be no doubt that the money was not payable immediately, and that it was not to be paid at all, unless the drafts were honoured. The plaintiffs were nonsuited.

So, an order from the (44) owner of a ship to the freighter to pay money "on account of freight" is no bill; because, the quantum due for freight may be open to litigation: but, such an order from the freighter (45) is; because, it is an admission that so much at least is due.

And an order to pay money "as (46) the draw-

(44) *Banbury v. Lisset*, Str. 1211. Gibson drew on the defendants in favour of the plaintiff "on account of freight of the galley Veale, Edward Champion, and this order shall be your sufficient discharge for the same." The action was brought against the defendants as acceptors, and they contended it was not a bill of exchange, because it was only payable out of a particular fund; and Lee, C. J. was of that opinion, but he left the point to the jury, who found for the defendants on another ground.

(45) *Pierson v. Dunlop*, Cowp. 571. M'Lintot freighted a ship of which Nichol was captain, and Pierson owner, and being unable to pay the freight, drew upon Dunlop and Co. in favour of Nichol "on account of freight" Pierson afterwards sued Dunlop and Co. as acceptors, and though other objections were taken, it was never insisted that this was contingent or payable only out of a particular fund.

(46) *Macleod v. Snee*, Lord Raym. 1481. Str. 762. 1 Barnard. 12. Macleod was sued in the Common Pleas as acceptor of a bill of exchange drawn by Dundas and indorsed to the plaintiff, dated 25th of May, 1724, by which Dundas required him one month after date "to pay 9*l.* 10*s.* as his (Dundas's) quarter's half-pay from the 24th June, 1724, to 25th September following, by advance," and obtained judgment. Macleod brought a writ of error, and insisted that this was similar to the cases of *Jocelin v. Laserre*, and *Jenny v. Herle*; but the whole court was of a contrary opinion; for per cur. "this bill was not payable upon a contingency, nor out of a particular fund, but is made payable at all events, and drawn upon the general credit

“er’s quarter’s half-pay by advance” before the pay will be due, is a good bill; because, it will be payable though the half-pay shall never become due.

So, a note to pay a sum of money (47) “being a portion of a value as under deposited in security for the payment hereof according to the receipt in my hands,” or “for value deposited and registered,” is a good note; because it imports to be payable at all events.

So, an order or promise to pay money “when (48) J. S. shall come of age,” specifying the day

“of the drawer, and not out of the half-pay, for it is payable as soon as the quarter begins, and the half-pay was not to be due till three months afterwards.”

(47) *Haussoullier v. Hartsink*, 7 Term. Rep. 733. The defendant issued two notes upon a deposit by one Richardson: one payable to J. S. or bearer, for 25*l.* “being a portion of a value as under, deposited in security for payment hereof according to the receipt in our hands,” and specifying the particulars of the deposit: the other, payable to J. S. or order “for value deposited and registered $\frac{1}{4}$.” The plaintiff discounted both notes, *bonâ fide*, and for a valuable consideration: and on a case reserved the court said they were clearly of opinion, that though as between the original parties to the transaction, the payment of the notes was to be carried to a particular account, yet the notes were payable at all events, and therefore the plaintiff was entitled to recover.

(48) *Goss v. Nelson*, Burr. 226. Action on a note payable to an infant “when he (the infant) shall come of age, to wit, 12th June, 1750;” and it was objected in arrest of judgment, that it was uncertain whether the money would ever have been payable, because the infant might have died under 21; but the

when that event is to happen, is a good bill or note ; because, it is payable though J. S. die in the interim.

And an order or promise (49) to pay “ within a “ limited time after a man’s death ” is a good bill or note ; because it must become payable at some time or other, though the exact period is uncertain : and if a bill or note be made payable at ever so distant a day, if it be a day that must come, it is no objection to the bill or note. (50)

So, an order or (51) promise to pay “ within a

court held it a good note, because it was payable at all events on the 12th June, 1750, though the infant should have died before that time.

(49) *Cooke v. Colehan*, Str. 1217. Willes, 393. On error from the Common Pleas, the court held a note payable “ six “ weeks after the death of the defendant’s father,” a good negotiable note, because there was no contingency whereby it might never become payable, but it was only uncertain as to the time, which is the case with all bills payable so many days after sight.

(50) Per Willes, Ch. J. in delivering judgment in *Colehan v. Cooke*, Willes’s Rep. 394.

(51) *Andrews v. Franklin*, Str. 24. A note payable two months “ after a certain ship (in his majesty’s service) should be paid “ off,” was objected to, as depending upon a contingency which might never happen : but per cur. “ the paying off the ship is a thing of a public nature ; it is morally certain : ” judgment for the plaintiff. In *Evans v. Underwood*, 1 Wils. 262. where an action was brought by an indorsee against the maker upon a note payable on the receipt of the payee’s wages from his majesty’s ship the *Suffolk*, the court thought the case like that of *Andrews v. Franklin*, and after looking into that case *are said* to have given judgment for the plaintiff. *Quære tamen*, because it was uncertain, though the wages might be paid, whether the maker would receive them.

“ limited time after the payment of money due from
 “ government ” is a good bill or note ; because it is
 morally certain that such payment will be made.

Sect. 7. — It is not in general essential that a
 bill or note should be dated.

But negotiable bills or notes, except bank-notes,
 for between 20s. and 5*l.*, if made in England,
 must. (52)

And notes payable to the bearer on demand
 must not have the dates printed. (53)

And giving false dates to evade the stamp duties
 upon drafts on bankers, or upon bills or notes not
 payable within two months after date or sixty days
 after sight, will subject the party to a penalty of
 100*l.* (54)

And leaving a blank for the date may create dif-
 ficulties, unless the stamp be sufficient for a bill or
 note of the most extended date.

If a bill or note is dated forward, of a day not
 arrived, and any of the parties die before that day,
 such deaths will be no bar to the remedy of a
 bonâ fide holder. (55)

So, if a blank be left for the date, and that date
 is afterwards filled up, the manner of filling it up

(52) See ante, p. 12, 13, 14, 15.

(53) See 55 G.3. c. 184. s. 18.

(54) See 55 G.3. c. 184. s. 12, 13.

(55) See *Passmore v. North*, post.

will furnish no ground of objection either to the original parties ;

Or to the person who filled it up ; (56)

Unless under the stamp laws.

Sect. 8. — Bills and notes are either inland or foreign : inland when made and payable within this kingdom ; and foreign, when made or payable abroad.

It was once doubted whether notes would be entitled to the aid of 3 & 4 Ann. c. 9., unless they were made in England (57): but, there have been instances (58) (59) (60) since in which actions have been brought upon such notes without excep-

(56) See *Usher v. Dauncey*, post.

(57) *Carr v. Shaw*, B. R. Hil. 39 Geo. 3. In an action on a promissory note made at Philadelphia, the first count of the declaration stated that the defendant, at Philadelphia, in parts beyond the seas, to wit, at London, &c. according to the form of the statute, &c. made his note in writing, &c. There were also the common money counts. The defendant demurred specially to the first count, and pleaded the general issue to the others. On the demurrer the court intimated a strong opinion that the statute did not apply to foreign notes, and advised the plaintiff to amend : but on the general issue Lord Kenyon said, " the note, though not within the statute, is evidence to support " any of the money counts," and the plaintiff had a verdict at Guildhall, 1st May, 1799.

N. The pleadings are entered as of Michaelmas Term, 39 G. 3. Roll. 1238.

(58) See *Pollard v. Herries*, 3 Bos. & Pull. 335, where the plaintiffs recovered upon notes made at Paris. See also *Splitgerber v. Kohn*, post.

tion; 48 G. 3. c. 149. s. 21. prohibited the negotiation or payment of such notes unless they were stamped; this prohibition is still continued by 55 G. 3. c. 184. s. 29. as to notes payable to the bearer on demand: and it has lately been decided, in the case (59) of a note made in Scotland, that the statute 3 & 4 Ann. applies to foreign as well as inland notes; and such notes are negotiable, and transferable by indorsement, in England. (59)

And it is no objection to a bill or note that it was made by a British subject in an enemy's country in time of war, if it do not appear to have been

(59) *Milne v. Graham*, 1 Barn. and Cr. 192. In an action by indorsee of a note against the maker, it appeared in evidence upon the trial that the note was made in Scotland, and it was objected that the act applied to notes made in England only: Abbott C.J. thought otherwise, and on motion for a new trial the court thought the case within the words and spirit of the act. The words are, "all notes." The act was made to advance trade, and was therefore entitled to a liberal construction; and it is for the advantage of commerce that foreign as well as inland notes should be negotiable. Rule refused.

Bentley v. Northhouse, 1 Moody & Malkin, 66. In an action by the indorsee of a note made in Scotland against the maker, it was insisted that Scotch notes were not negotiable, or transferable by indorsement, the power of so transferring them being created by 3 & 4 Anne, and that Act, as being before the union, not extending to Scotland: but Lord Tenterden said, there was nothing in the act to confine its operation in England to notes made there: the words "as inland bills" in the act apply only to the manner of transferring and enforcing the notes, not to the sort of notes: within the jurisdiction, therefore, of the act, that is, in England, *all notes*, wheresoever made, are transferable by indorsement. Verdict for plaintiff.

made for any illegal purpose, and it were made payable to a neutral. (60)

Or, if made by a British prisoner of war, though made payable or indorsed to an alien enemy. (61)

Inland bills and notes seldom consist of more than one part: foreign bills in general consist of several.

The several parts of a bill are called a set.

Each part ought to contain a condition that it shall be payable only so long as all the others remain unpaid: in other respects all are of the same tenor.

This condition should be inserted in each part, and should in each mention every other part of the set; for if a man, with an intention to make a set of three parts, should omit the condition in the first, and make the second with a condition mentioning the first only, and in the third alone take notice of the other two (which, by the way, is the mode pointed out by (62) Molloy, (63) Malynes,

(60) *Houriet v. Morris*, 3 Campb. 303. Payees against maker on note made at Paris in time of war: defendant was a British subject, plaintiffs neutral merchants in Switzerland: the note was given by defendant for watches bought by him in Paris of plaintiffs: it was objected that this was a trading in an enemy's country in time of war, and that a note founded on such trading was not valid: but Lord Ellenborough said, plaintiffs were not enemies, and might legally sell their goods in an enemy's country, and defendant did not appear to have bought them for any illegal purpose. Plaintiffs had a verdict.

(61) See *Antoine v. Morshead*, and *Daubuz v. Morshead*, post.

(62) Book 2. c. 10. s. 14.

(63) Book 3. c. 5. p. 261, 262.

and (64) Marius), he might perhaps in some cases be obliged to pay each ; for, it might be questionable if it would be any defence to an action on the second that he had paid the third, or to an action on the first that he had paid either of the others.

But an omission is not, perhaps, material, which upon the face of the condition must necessarily have arisen from a mistake ; as, if in the enumeration of the several parts one of the intermediate ones were to be omitted, for instance, “ Pay “ this my first of exchange, second and *fourth* not “ paid.”

Where a bill consists of several parts, each ought to be delivered to the person in whose favour it is made, (unless one is forwarded to the drawee for acceptance,) otherwise there may be difficulties in negotiating the bill, or obtaining payment.

Sect. 9. — A bill or note may fix a particular place for payment.

And where this is what is to be considered as part of the bill or note, it is, except in cases in which 1 & 2 Geo. 4. c. 78. has made a difference (65), a variance to omit stating it (66) ; and where it is

(64) P. 7.

(65) See *Selby v. Eden*, 3 Bingh. 611. And *Fayle v. Bird*, 6 Barn. and Cr. 631. post.

(66) *Hodge v. Fillis*. See post.

not to be considered as part of the bill or note, it may be a variance to state it. (67)

And in an action against the maker of the note, or acceptor of the bill, it may be necessary, where it is part of the bill or note, to allege and prove presentment at that place. (68)

In cases to which 1 & 2 Geo. 4. does not apply, the place is considered part of the instrument where it is incorporated in the body of the bill or note; where it is detached from the body as a memorandum only, not: and in cases within 1 & 2 Geo. 4. the place will be considered as part of the instrument, if it be made payable there “and not otherwise or elsewhere.”

Notes payable to bearer on demand, if for less than 20*l.*, must be made payable at the bank or place where they are made or issued. (69)

But they may be made payable at several places, so as such bank or place be one. (69)

And bills or notes by banking corporations, or banking copartnerships of more than six members, if payable to the bearer on demand, or, in the case

(67) *Exon v. Russel*, post.

(68) *Roche v. Campbell*. See post.

(69) By 7 G. 4. c. 6. § 10. every promissory note, payable to bearer on demand, for a sum of money under 20*l.*, made and issued after 5th April 1829, shall be made payable at the bank or place where the same shall be so made and issued: Provided, that it shall not prevent its being made payable at several places, if one of such places be the bank or place where the same shall be issued.

of bills, if for less than 50*l.*, must be made payable at some place or places to be specified therein, not within the distance of sixty-five miles from London. (70)

Sec. 10. — Bills and notes are made payable to order, or to bearer, or to specified individuals.

A bill or note payable to J. S. or order, is payable to the order of J. S. and negotiable by indorsement. A bill or note payable to J. S. or bearer, is (71) payable to the bearer and negotiable by delivery; and in the latter case J. S. is a mere cipher.

If a bill or note import to be payable to a person not in esse or his order, and be issued with an indorsement in blank, purporting to be made by him thereon, it is, as against the drawer or maker, to be considered as a bill or note (72) payable to

(70) 7 G. 4. c. 46.

(71) *Grant v. Vaughan*, Burr. 1516. Vaughan gave Bicknell a draft upon his banker payable "to ship Fortune or bearer." The draft came to the hands of Grant, who sued Vaughan upon it. The defendant contended that this draft was a mere authority to receive the money, and not negotiable, and that point and another being left to the jury, they found for the defendant; but, upon an application for a new trial and cause shewn, the court held clearly that it was negotiable, and a new trial was granted, in which the plaintiff recovered.

(72) This point has been repeatedly discussed within a few years upon several bills drawn in 1788. A case of the kind had occurred at the London Sittings after Easter Term 1769; *Stone v. Freeland*, cited 1 H. Bl. 316. in the notes: a bill drawn by Cox on the defendant was made payable to Butler and Co. or

bearer ; and so is a bill as against the acceptor, if he knew at the time of his acceptance, that the payee was a fictitious person.

their order, and indorsed in their name ; and instead of proving that this indorsement was made by Butler and Co., the plaintiff's own witnesses said, they believed it was made by Cox, and though there was a house under the firm of Butler and Co. with which Cox had dealings, it was proved that the bill had never been in their hands, upon which it was contended that the indorsement being fictitious, the plaintiff could not recover ; but by Lord Mansfield, " the intent of the bill was only to enable " Cox to raise money, and the reason why it was not made " payable to his order was, that there would then have been " too many payable to his order in circulation at the same " time, which would have had the appearance of fictitious " credit ; names are often used of persons who never existed ;" and it appearing that the defendant promised to pay the bill at the time the plaintiff discounted it, the jury, upon the footing of that undertaking, found a verdict for the plaintiff. As this case, however, was distinguishable from those on the bills drawn in 1788, on account of the express undertaking to pay the plaintiff, which (as was admitted by Mr. J. Ashurst, who held a brief in the cause, in 3 Term Rcp. 176.) was the ground of the determination, as this was a *nisi prius* decision only, and as the amount of the bills in 1788 was very considerable, the point was very strongly contested in the actions on those bills. The first case that came before the court was *Tatlock v. Harris*, 3 Term Rep. 174. It was an action brought upon a bill drawn by the defendant, as one of several partners in a house at Nottingham upon himself in London, payable to Grigson and Co. or order, and purporting to be indorsed by Grigson and Co. and Lewis and Potter ; the defendant was sued upon the bill, and the declaration contained counts upon the bill, and counts for money paid and money had and received. It appeared in evidence that there was no such house as that of Grigson and Co. ; that the defendant paid the bill to Lewis and Potter, to whom he was indebted, and they gave him credit in account ; and

It was for some time unsettled whether it was not essential that a bill or note should be payable

that the plaintiffs discounted it for Lewis and Potter: to this evidence the defendant demurred; and after argument and time taken to consider, the court intimated a strong opinion that the plaintiffs might recover on the counts upon the bill: but the ground of their decision was, that he was entitled to recover on the counts for money paid, and money had and received; because, the giving the bill was an appropriation of so much money to be paid to the person who should become holder of the bill, and therefore when the plaintiffs discounted it, they paid the money to the use of the defendant, and when Lewis and Potter gave the defendant credit for the value of the bill, that was money had and received to the use of such persons as should afterwards be the holders of the bill.

The next case was that of *Vere v. Lewis*, 3 Term Rep. 182. which was an action against the defendant as acceptor, and the only difference between that and *Tatlock v. Harris* was, that there was no evidence to shew that the defendant had received any value for the bill, and that there was strong evidence to shew that the indorsement, in the name of the payee, was made by the defendant; but the court held that the latter circumstance did not vary the question, and that the acceptance was evidence that the defendant had received value from the drawers, and therefore they gave judgment for the plaintiffs without argument. Lord Kenyon, Mr. J. Ashhurst, and Mr. J. Buller, thought also that he was entitled to recover on one of the counts of the declaration, which stated the bill to be payable to bearer.

This case was followed by that of *Minet v. Gibson*, 3 Term Rep. 481. 1 H. Bl. 569. where a bill, drawn by *Livesay and Co.* on the defendants, was made payable to *John White*, or order; and it was found upon a special verdict, that *White* was a fictitious person; that his name was indorsed upon the bill by *Livesay and Co.*; that the defendants knew, when they accepted the bill, that no such person as *John White*, whose indorsement was then upon the bill, existed; and that the indorsement was

either to order, or to (73) bearer, but it is now decided that it is not.

But where the bill or note is payable otherwise than to the bearer, it must show who is to be the payee.

Uncertainty as to the person to whom the payment shall be made will prevent an instrument

not made by any person of that name: the court of King's Bench thought this case decided by Vere and Lewis, and gave judgment for the plaintiffs; and on a question from the House of Lords, whether the bill might not be deemed in law to be payable to the bearer, Hotham, Perryn, and Thompson Barons, and Gould J. gave it as their opinions that it might; but Eyre C. B. and Heath J. differed: after which Lord Kenyon, Lord Loughborough, and Lord Bathurst spoke in favour of the judgment, and Lord Thurlow against it, and the judgment was affirmed without a division.

After the judgment in *Minet v. Gibson*, in the King's Bench, and before its determination in the House of Lords, came on the case of *Collet v. Emmett*, 1 H. Bl. 313. where Livesay and Co. (who were authorised by the defendant to draw for him by his writing his name on a piece of blank paper with a shilling bill stamp thereon), made a bill payable to George Chapman, or order, and indorsed it with George Chapman's name; and it appearing that there was no such person as George Chapman, the court of Common Pleas, after two arguments, and time taken to consider, held that the action might fairly be supported on a count that stated the bill to be payable to bearer, and there being such a count in the declaration, they gave the plaintiffs judgment upon it. Vide *Bennet v. Farnell*, 1 Campb. 180.

(73) *Smith v. Kendal*, 6 Term Rep. 123. In an action for money paid and lent, the defendant pleaded the statute of limitations, and the plaintiff replied a *latitat* sued out 26th Sept. 1793. A note was given in evidence, dated 25th June, 1787, and payable to the plaintiff three months after date; but it was

from being a bill or note : as, making it payable to *A. or B.* (74)

not payable either to order or to bearer, and the court, on consideration, held that it was a good note within the statute, that it was entitled to three days' grace, and consequently that the statute of limitations did not begin to run until those three days had expired, which was on 28th September, 1787, and therefore within six years of 26th September, 1793. See also *Chadwick v. Allen*, *antè*, p. 4. The old entries also describe the custom upon bills to be to pay the payee without adding any words to make them payable to order or to bearer. *Lutw.* 231. 277. 891. *Vid.* 17 *Brownl. Rep.* 77. *Clift.* 916.; and see *Lord Raym.* 1545.

Rex v. Box, 6 *Taunt.* 325. Indictment for forging a promissory note. The note was as follows: "On demand we promise to pay Mesdames S.W. and S.D., stewardesses for the time being of the Provident Daughters Society, held at the Hope, Smithfield, or their successors in office, 64*l.*, with 5*l.* per cent. interest, value received this 7th February, 1815, for F.C. and Co. J. Forster." This society was not enrolled according to 33 *G. 3. c. 34.*, so that these payees were not strictly stewardesses, nor could they legally have successors in office, and it was insisted that this was not in law a promissory note: but on a case for the opinion of the twelve judges, they were unanimously of opinion that it was: that it was not essential a note should be negotiable; that the description of stewardesses was one which went to designate the payees, and the note, if genuine would have enured to them, and the survivor of them, and the executors and administrators of such survivor; and the conviction of the prisoner was held right.

(74) *Blankenhagen v. Blundell*, 2 *Barn. & Ald.* 417. Declaration on a note by which it was stated that defendant promised to pay J. P. Dahmer or plaintiffs, or his or their order; another count stated Dahmer to be since dead: each count averred that the note was delivered to plaintiffs, and negatived payment to Dahmer: defendant demurred, and on argument the court were clear this was not a note within the statute, because it was not payable in certain either to Dahmer or the plaintiffs, but the

If a bill or note be issued with a blank for the payee's name, any *bonâ fide* holder may insert his own name as payee. (75)

claim of either, or of the indorsee of either, might be defeated by payment to the other; and if it were not within the statute, when issued, subsequent events could not make it so. It was urged, that in legal operation it was payable to Dahmer and plaintiffs, but the court said they could not take that to be its operation, as the declaration was framed, and judgment was given for the defendant.

(75) *Cruchley v. Clarence*, 2 M. & S., 90. In an action by the payee of a bill against the drawer, it appeared that defendant drew the bill in Jamaica, and sent it to England with a blank for the payee's name; that it was put into negotiation here, and afterwards paid to the plaintiff for an old debt, without the blanks being filled up; and that he inserted his own name as payee: plaintiff had a verdict; and on motion for nonsuit or new trial, the court held plaintiff warranted in inserting his own name, for by leaving the blank the defendant authorised any *bonâ fide* holder to fill it up, and the rule was refused.

Cruchley v. Mann, 5 Taunt. 529. Plaintiff brought another action on the same bill against the acceptor: one objection was that the blank was filled up without Clarence's authority, and Clarence gave in evidence that he did not authorise the insertion; but it appeared that Clarence had passed the bill to Vashon, that Vashon had passed it to plaintiff, and that defendant accepted it under Clarence's eye and at Clarence's instance, after plaintiff's name was inserted; the court was clear that Clarence's consent must be implied, and a rule for a new trial was refused.

Atwood v. Griffin, 1 Ryan & M. 425. A bill was issued, payable to _____ or order: it was *bonâ fide* passed to P. Groves, and he filled up the blank with his own name, and indorsed it to plaintiffs. Plaintiffs declared upon it as if P. Groves's name had been inserted as payee when the bill was made. It was insisted that this insertion vacated the bill, or made a new stamp necessary, or at least that it was misdescribed,

And it may be declared upon as though his name had been inserted when the bill or note was made. (75)

But, until the blank is filled up, it is not a bill or note. (76)

Unless, perhaps, where it may be considered in legal operation as payable to the order of the drawer.

Giving a payee a wrong description, if there be no doubt as to the person, is of no (77) consequence.

Sect. 11. — The (78) name of the person making it must be inserted in the body, or subscribed

for it was not *ab origine* payable to P. Groves. But Best C. J. thought it an answer to all the objections, that P. Groves had a right to insert his own name, and that the defendant (the acceptor) had virtually engaged to be answerable upon it when it should be in the form a *bonâ fide* holder had a right to give it.

(76) *Rex v. Randall*, Trin. 1811. The prisoner was indicted for forging a bill of exchange: the bill was payable to or order (leaving a space for the payee's name), and was in appearance a navy-bill for an officer's wages; the point was saved for the consideration of the judges, whether this could be deemed a bill, there being no payee: it was urged that such a bill authorized any proper holder to fill up the blank as he might choose; but the judges held it was no bill till the blank was filled up, and recommended it to the judge who tried the prisoner to apply to the Crown for his pardon.

(77) See *Rex v. Box*, *antè*, p. 35.

(78) *Taylor v. Dobbins*, Str. 399. The declaration upon a note stated that the defendant wrote it with his own hand, but

at the bottom of every bill or note, and every bill or note must be written or signed by the person making it, or some one authorized by him for that purpose.

The clerk, who signs bank notes, need not have authority for that purpose under the common seal. (79)

did not allege that he signed it, and an exception was taken on that ground. *Sed per cur.* "If the defendant wrote it, his subscription to it was unnecessary; it is sufficient if his name appeared in any part. 'I, J. S. promise to pay,' is as good as 'I promise to pay,' subscribed 'J. S.'"

Elliot v. Cowper, Str. 609. Lord Raym. 1376. 8 Mod. 307. It was objected on demurrer to a declaration on a note, that it alleged only that the defendant made it, but did not state that he signed it; but by the court, "if he did not either write or sign it, he did not *make* it, for making implies signing, and making is alleged." Judgment for plaintiff.

Smith v. Jarves, Lord Raym. 1484. The declaration upon a note drawn by Jarves and Baily, stated that Jarves for himself and partner made his note in writing with his own hand subscribed, whereby he promised for himself and partner to pay. It was objected on demurrer, that it was not charged, that Jarves had signed the note for himself and Baily; but the court held the statement shewed that Jarves did sign for himself and Baily, and gave the plaintiff judgment.

Ereskin v. Murray, Lord Raym. 1542. In an action on a bill it was alleged that the plaintiff made his bill in writing, and thereby requested the defendant to pay. It was objected on error, that it did not appear that the plaintiff signed the bill; but it was answered, that the allegation that he made it, and required the defendant to pay, implied that his name was in it (otherwise he could not request,) and that he or somebody for him wrote it. Judgment for the plaintiff was affirmed.

(79) *Rex v. Bigg*, 3 P. Will. 419. On an indictment under 8 & 9 W. 3. c. 20. s. 36. for altering and erasing a genuine bank

And now by 1 Geo. 4. c. 92. s. 3. his signature may be impressed by machinery.

The signature to a bill or note must import to bind at all events each person who signs it. A note signed "A. B. or else C. D." is not, as against C. D., binding as a note. (80)

If A sign his name upon a blank paper stamped with a bill-stamp, and deliver it to B. to draw such bill as B. may choose thereon, A (81) is the drawer of such bill, to which the stamp is applicable, as B. shall draw thereon.

note, it was found upon a special verdict that the person who signed the note was employed by the company to sign notes, but that he had no authority under their common seal: an objection was taken, that an authority under their common seal was necessary: many other objections were taken, and what was the opinion of the judges upon each is not stated; but Mr. P. Williams, who argued for the prisoner, says the judges were divided, but the majority of the judges held it to be felony, and the prisoner was transported, not executed: the majority, therefore, must have thought an authority under the common seal not necessary.

(80) *Ferris v. Bond*, antè, p. 17.

(81) *Collis v. Emett*, 1 H. Bl. 313. Emett signed his name upon a blank paper stamped with a shilling bill-stamp, (the highest stamp then in force for bills,) and delivered it to Livesay and Co. that they might draw thereon such bill as they should please. They drew one for 1551*l.* at three months' date, which was duly transferred to Collis and Co., and Collis and Co. sued Emett thereon. A special verdict was found, principally with a view to another point; the Court held Emett answerable, and the plaintiffs had judgment. See *Russell v. Langstaffe*, post. *Pasmore v. North*, post. *Usher v. Dauncey*, post.

Sect. 12. — The signature to a bill or note may be attested by a subscribing witness; but, in that case, no evidence can be given of such signature, unless such witness be produced, or his absence properly accounted for.

Negotiable bills or notes for 20*s.* or any greater sum not exceeding 5*l.* must be attested, and so must their indorsement. (82)

Sect. 13. — It was for some time matter of controversy whether it was not necessary that a bill or note should import to be for value received; it is now however settled (83) that it need not.

But notes for coals in ships in the port of London must, by 3 G. 2. c. 26. s. 7, 8., import to be for value received in coals; and a refusal to insert words to that effect, or taking a note without such words, subjects the buyer and master of the ship to a penalty of 100*l.* (84.)

(82) 17 G. 3. c. 30, ante, p. 12.

(83) *White v. Ledwich*, B. R. Hil. 25 G. 3. A declaration upon a bill of exchange was demurred to, because it was not stated to have been given for value received, but the court said, it was a settled point, that it was not necessary, and gave judgment for the plaintiff. The same point is ruled in *Macleod v. Snee*. Lord Raym. 1481. See also Fort. 282. 8 Mod. 267. 1 Barnard. 88. Lutw. 889. 1 Mod. Ent. 310. 1 Show. 497.

(84) By 3 G. 2. c. 26. s. 7. every contractor for coals on board any ship or vessel in the port of London, shall, at the time of the delivery of such coals, either pay for them in ready money,

The omission will not, however, make the note void. (85)

Sect. 14. — A memorandum on a bill or note before it is issued, may, in some instances, be considered as part of the bill or note, and control its operation :

As, a memorandum, that if any dispute shall arise respecting the consideration, the bill or note shall be void. (86)

But, a memorandum upon a note to state where it shall be payable, is not. (87)

or, for such part as shall not be so paid for, shall give his promissory note or notes for payment thereof, expressing therein the words "value received in coals;" and by s. 8. all lightermen, or other buyers of or contractors for coals, who shall refuse to give their notes for coals to them respectively delivered, and shall refuse to insert the words "value received in coals," and every such master (*i. e.* master of a ship or vessel with coals in the port of London) who shall take any such note from any dealer in coals, in which note the words "value received in coals" are not expressly inserted, such lightermen, buyers of or contractors for coals, and masters, shall, for every such refusal or acceptance, respectively forfeit 100*l.*

(85) Per Holroyd J. 1 Stark. 463.

(86) See *Hartley v. Wilkinson*, *antè*, p. 20.

(87) *Exon v. Russell*, 4 M. & S. 505. At the bottom of a promissory note was written "At Messrs. Brown and Co.'s, bankers, London." In an action against the maker, the declaration alleged that defendant made the note, and thereby promised to pay, &c. and made the same payable and to be paid at the house of certain persons described as Messrs. Brown and Co.'s : there was no averment or proof of presentation at Brown and

Nor is a memorandum of acceptance on a note payable after sight. (88)

Nor is a memorandum by way of direction to the payee's executors, in case of his death. (89)

Nor a memorandum which cannot be read for want of an agreement stamp. (89)

Nor one which has an attesting witness, and cannot be read on account of his absence. (89)

Co.'s; and on a rule nisi for a nonsuit for want of such proof, and cause shown, the court held that as the "At Messrs. Brown and Co.'s" was a memorandum only, and no part of the note, it was a misdescription to state it as part of the legal effect of the note itself to make it payable there, and on that account the rule was made absolute.

(88) *Splitgerber v. Kohn*, 1 Stark. 125. Indorsee against maker on a note made in Prussia, and payable seven days after sight: in the margin were these words, "Accepted on myself, payable everywhere," and these words were on the note when it issued; it was urged that they altered the nature of the note, and should have been noticed in the declaration; but Lord Ellenborough said they constituted no part of the original instrument; they were merely an acknowledgment of a sight of the note; and though they were contemporaneous with the note, their effect was in point of law subsequent.

(89) *Stone v. Metcalfe*, 1 Stark. 53. 4 Campb. 217. In an action by payee against maker on a note for 1000*l.* and interest, payable months after date, there appeared to be a memorandum indorsed upon the note, but that memorandum was attested by J. S.: it was urged for defendant that he had a right to have the memorandum read as well as the note: but per Lord Ellenborough, "Plaintiff is entitled to have the note read, having proved defendant's hand-writing; but the indorsement may be an unconnected instrument." J. S. was then called, and proved the indorsement, which was as follows: "Although the within note is payable in months, my will

Sect. 15. — The act of drawing a bill implies an undertaking from the drawer to the payee, and to every other person to whom the bill may afterwards be transferred, that the drawee is a person capable of making himself responsible for its payment, that he shall, if applied to for the purpose, express in writing upon the bill an undertaking to pay it when it shall become payable, and that he shall then pay it: and subjects the drawer on a failure in any of these particulars to an action at the suit of the payee or holder.

The making of a note is an express engagement to the payee, or person to whom it shall be transferred, to pay the money mentioned therein, according to its tenor.

and desire is that it shall not then be called in, and if defendant shall wish for further time, he shall have it without suit at law until three years after my decease ;" it was urged that this indorsement made part of the note, and that neither of them could be read, because, taken together, they required an agreement-stamp. Sed per Lord Ellenborough : " I have on one side " a perfect note, and on the other that which, if stamped, might " have operated as a defeasance, but at which, for want of a " stamp, I cannot look : but if the words were incorporated, " they are words of mere indulgence and favour. As to the " executors, the case might be different." The plaintiff had a verdict.

C A P. II.

Sect. 1. *Parties to a Bill or Note.*

2. *Infants*, p. 44.

3. *Femes Covert to bind herself*, p. 47.

4. *Bankrupts*, p. 49.

5. *Several Persons not connected in Partnership*, p. 50.

6. *Partners or Corporations*, p. 53.

7. *Agents*, p. 69.

8. *Persons standing en auter droit*, p. 74.

9. *Aliens*, p. 75.

A BILL or note cannot properly be made or indorsed by, nor can a bill be properly addressed to any person incapable of making himself responsible for the payment, nor can they be properly made payable or indorsed to any person incapable of suing.

Sect. 2. — Therefore, a bill or note cannot properly be made or indorsed by, nor can a bill be properly addressed to, an infant (1); except, perhaps,

(1) *Williams v. Harrison*, Carth. 160. 3 Salk. 197. In an action against the drawer of a bill, the defendant pleaded infancy, and the plaintiff demurred, and the court held clearly without argument, that infancy was a good bar; for the bill was drawn by the defendant as a trader in course of trade, and not for necessities.

where it is drawn, indorsed, or accepted for necessities. (2)

But if an infant draw a bill to his own order, and indorse it, and the drawee accept it, the acceptance will bind the drawee, and he will be compellible to pay the indorsee, because, by accepting, he precludes himself from disputing the competence of the drawer. (3)

And the drawing, indorsing, or accepting by an infant, is voidable only, not void (4), and if he ra-

(2) *Williamson v. Watts*, 1 Campb. N. P. C. 552. In an action against the acceptor of a bill, the defendant pleaded infancy, and the plaintiff replied that the bill was accepted for necessities, on which issue was joined: on opening the case Sir J. Mansfield C. J. said, "This action certainly cannot be maintained. The defendant is allowed to be an infant, and did any one ever hear of an infant being liable as an acceptor of a bill of exchange? The replication is nonsense, and ought to have been demurred to." He said as the point of law was so clear, he felt strongly inclined to nonsuit the plaintiff; but he heard the evidence, and the plaintiff was nonsuited, on proof that the goods, for which the bill had been given, were not necessities. See *Trueman v. Hurst*, 1 T. R. 40.

(3) *Taylor v. Croker*, 4 Esp. N. P. C. 187. In an action against the acceptor of a bill, drawn by Eversfield and Jones on the defendant, in their own favour, and indorsed by them to one S. and by him to the plaintiff; it appeared that both the drawers were infants at the time of drawing the bill. But Lord Ellenborough held, that though that might have been a good defence had the action been brought against the drawers themselves, it was no defence in the present action. Verdict for the plaintiff.

(4) *Gibbs v. Merrill*, 3 Taunt. 307. A bill was accepted by Merrill and Le Blond; Le Blond was an infant. An action being brought against Merrill only, he pleaded that he did not

tify the act after he comes of age, it will bind him.

And it is no objection that the drawee of a bill was an infant when the bill was drawn, if he were of age when he accepted it. (5)

As an infant is capable of suing (6), he may be a payee or indorsee.

But it may be questionable, in some cases, whether payment should not be made to his guardian. (7)

undertake unless jointly with Le Blond. Replication that he did; plaintiff proved Le Blond's infancy, and defendant proved by Le Blond, that he had never disaffirmed the acceptance. The jury found for the plaintiff; but on a rule nisi for a new trial, and time to consider, the court held Le Blond's acceptance voidable only, not void; and that the issue should have been found for the defendant; they therefore set aside the verdict, but gave the plaintiff leave to amend his replication by stating Le Blond's infancy, and so raising the question whether he was compellible to join him.

(5) *Stevens v. Jackson*, 2 Rose, 284. 4 Campb. 164, 165. Plaintiff was an infant when a bill upon him was drawn, but he was of age when he accepted it. Gibbs C. J. was clear the acceptance bound him.

(6) See *Teed v. Elworthy*, 14 East, 210. *Warwick v. Bruce*, 2 Maule & S. 205. 6 Taunt. 118.

(7) See Pothier pl. 166. who observes, that payment to an infant will be no discharge of the debtor, unless it appear that the payment were beneficial to the infant; if the money were applied to his advantage, the payment will be good; if not, as where the infant squanders it, the party paying will not be discharged. So money lent to an infant for necessaries, if duly applied, may in equity be recovered from him. *Marlow v. Pitfield*, 1 P. Williams, 558. Though it is otherwise at law, 1 Salk. 279. 386. But if an executor pay a legacy to an infant, which

Sect. 3. — Bills or notes cannot properly be made, indorsed, or accepted by a feme covert, unless where she acts by authority from her husband (8); or where she resides here, and he is under a civil incapacity of being in this kingdom. (9)

the infant's father obtains and dissipates, the executor will be answerable to the infant. *Phillips v. Paget*, 2 Atk. 80. See also Pothier on Obligations, part iii. ch. 1. art. 2. s. 1. pl. 504. and s. 2.

(8) *Barlow v. Bishop*, 1 East's Rep. 432. Ann Parry was married, but traded in her own name, with her husband's consent. She became indebted to the plaintiff, and to enable her to pay him, the defendant, who knew that she was married, gave her a note payable to her or order. She indorsed it in her own name to the plaintiff, and he brought this action. Lord Kenyon thought it not maintainable, but saved the point; and after a rule nisi for a nonsuit, and cause shown, he said it was clear that the delivery of the note to the wife vested the interest in the husband; that as he permitted her to trade on her own account, and this was a transaction in the course of that trade, he was not prepared to say, that had she indorsed the note in his name, it would not have availed; the jury might have presumed that she was authorized by her husband; but the indorsement being in her own name, it was impossible to say it could pass the husband's interest. Rule absolute.

Cotes v. Davis, 1 Campb. N. P. C. 485. In an action by an indorsee against the maker of a note made payable to "Mrs. Carter, or order," and indorsed by her in her own name, the defendant offered to show that Mrs. Carter was wife to one Cole; but it being proved, that subsequently to the indorsement, and when the note was presented for payment, the defendant had promised to pay it, Lord Ellenborough said the jury might presume that she had authority from her husband to indorse the note, and *that* in the name by which she passed in the world. Verdict for the plaintiff.

(9) *Vide Derry v. Duchess of Mazarine*, Lord Raym. 147.

Her living apart from her husband, and having a separate maintenance secured by deed (10), or her trading by particular custom on her own account (11), gives her no capacity to draw, indorse, or accept.

Though a tradesman cannot write, and his wife write for him whatever is requisite in his trade, he will not be liable upon a bill or note signed by her, unless there is some evidence that it was signed by her in respect of his trade (12);

(Though she sign it in his name (12);)

Or that he has recognised it. (12)

If a bill or note be made payable, or indorsed to a feme covert, whose husband is under no civil incapacity, the wife alone cannot, except as agent to her husband, make it available, or sue upon it; (13)

The husband may.

Salk. 116. *Sparrow v. Carruthers* cited Blackst. 1197. 1 Term Rep. 6. See also Blackst. 1081, 1082. 1 Term Rep. 9.

(10) Vide *Marshall v. Rutton*, 8 Term Rep. 545.

(11) Vide Blackst. 1081. *Candill v. Shaw*, 4 Term Rep. 361. But see also *Lacie v. Phillips*, Burr. 1776.

(12) *Smith v. Pedley*, MS. 1824. In an action by the indorsee of a note against defendant as maker, it appeared that defendant could not write, that his wife wrote for him whatever was requisite, and that this note was signed by the wife in his name; but there was no evidence that the note was given on account of any concerns of the husband: it was, however, left to the jury to presume it was given for the husband's concerns; and the jury found for the plaintiff. But on a rule nisi for a new trial, the court thought there was nothing to warrant such presumption by the jury, and a new trial was granted.

(13) See *Barlow v. Bishop*, *antè*, 47.

And he may either negotiate it ;

Or sue upon it.

And he may either sue upon it in his own name, and treat it as if it were made payable to himself; (14)

Or sue upon it in the joint names of himself and his wife. (15)

Sect. 4. — If a bill or note be made payable to an uncertificated bankrupt or order, the bankrupt's indorsee may sue the drawer of the bill or maker of the note; because, as against these parties the form of the bill imports that the bankrupt is capable of indorsing. (16)

At least he may, if he took the bill or note *bonâ fide* and for value, and the assignees do not oppose his claim. (16)

(14) *Arnold v. Revoult*, 1 Brod. & Bingh. 443.

(15) *Philliskirk v. Pluckwell*, 2 M. & S. 893. Note to a feme covert; action thereon by her and her husband. Rule nisi for a nonsuit; but, on cause shown, the court held that as a note *primâ facie* imported a consideration according to its tenor, and the wife might have been the meritorious cause of it, or it might have been given for a debt due to her before marriage, the husband might suffer her to join in suing upon it, and the rule was discharged.

(16) *Drayton v. Dale*, 2 Barn. & Cr. 293. Defendant made a note in 1818, payable to Clarke or order: Clarke indorsed it to Knight and Freeman, to whom he was indebted, and plaintiff gave Knight and Freeman the amount in money. Neither Knight, nor Freeman, nor plaintiff, knew the circum-

And if the bankrupt sue upon the bill or note, it is an answer to his suit that his assignees have required the defendant to pay them. (17)

Sect. 5. — If several, who are not partners, join in a note, and it begins with, "I promise," &c. it

stances under which the note was given: it was, in fact, given for a debt Dale owed Clarke before November, 1814. In November, 1814, Clarke became bankrupt, and Clarke had arranged with one of his assignees to take this debt upon himself: plaintiff having sued defendant, defendant pleaded first the general issue, upon which plaintiff had a verdict; and secondly, Clarke's bankruptcy, and that therefore the right to indorse was in Clarke's assignees. Plaintiff replied, that Clarke's assignees consented to the indorsement to him; but, he failed in proving that plea, and that fact, therefore, was found against plaintiff. On special case as to the general issue, including the question whether the special plea was valid, or whether plaintiff should not have judgment notwithstanding the verdict on that plea; the court was clear upon argument, that as the assignees did not dispute plaintiff's right, it was not competent for defendant, who by the form of the note had held out that the plaintiff was capable of indorsing, to contend that he was not; and they awarded judgment to plaintiff.

(17) *Kitchen v. Bartsch*, 7 East, 53. Assumpsit on two notes of 15th August, 1801, payable to plaintiff. Plea, a commission of bankruptcy against plaintiff in June, 1801, and that the assignees had required him to pay them. Replication, that the notes were made after the assignment under the commission; that defendant treated with plaintiff as a person capable of receiving credit; and that there was no new assignment to the assignees: on demurrer, the plea was held good, the replication bad.

is several as well as joint, and it will bind each individual separately; (18)

And all jointly. (19)

(18) *Clark v. Blackstock*, Holt, 474. A note was in this form: "I promise to pay plaintiff, or order, 30*l.* with interest, value received: Thos. Jackson, Jno. Blackstock." In an action against Blackstock alone, two objections were made: one, that this was the joint note of Jackson and Blackstock; and, secondly, that there should have been an additional stamp for Blackstock's signature; it was ruled that the word "I" made the note several as well as joint; and, secondly, that the necessity of an additional stamp would depend upon this, viz. whether Blackstock's signature was part of the original bargain before plaintiff took the note, or an afterthought; and it appearing to have been part of the original bargain, verdict for plaintiff.

March v. Ward, Peake, 130. A note signed by Bowling and Ward began, "I promise to pay," and in an action against Ward alone, it was objected that the note was *joint only*, and not several; but Lord Kenyon held it was several as well as joint, and said it had been so decided on a case from Chester. "*I applies to each severally.*" Verdict for the plaintiff.

Hall v. Smith, Hil. 1823. 1 Barn. & Cr. 407. A note was in this form: "I promise to pay the bearer on demand one pound, value received: for Wm. Smith, W. P. Smith, and W. R. Taylor; Wm. Smith." An action being brought on this and several similar notes against W. Smith alone, he pleaded in abatement that he did not undertake, unless jointly with W. P. Smith and W. R. Taylor; but on issue inde and case, the court held that, though this might bind the whole firm jointly, it bound the defendant separately; that upon the form of the note he was the only promising party, and after having used that form it was not for him to complain that he was sued separately; and that by requiring a joint action, a plaintiff would be bound at his peril to prove that all the partners he sued were partners, and that was a risk to which the form of the note did not import to make him liable.

(19) *Lord Galway v. Matthew*, post, n. (24).

And it requires only one stamp, if it were the bargain before it was issued that all should join. (20)

But if there were no such bargain, the addition of a fresh signature after it was once issued would make a new stamp necessary. (20)

If a bill or note be payable to several persons, not in partnership, the right to transfer is in all collectively, not in any individually. (21)

And an indorsement by and in the name of one only, will not give the indorsee a right to sue. (21)

So if a bill be drawn on several persons not connected in partnership, an acceptance by one will bind him, but him (22) only.

(20) See *Clark v. Blackstock*, *antè*, n. (18).

(21) *Carvick v. Vickery*, Dougl. 2d edit. p. 653. n. 134. A bill was drawn by father and son, who were not partners, payable *to their own order*. The son alone indorsed it; and, upon an action by his indorsee against the acceptor, Lord Mansfield thought an indorsement by both parties essential, and nonsuited the plaintiff. A new trial, however, was afterwards granted, the court, after time taken to consider, being of opinion that, by making the bill payable to their own order, the father and son had made themselves partners as to this transaction; but upon the second trial Lord Mansfield said, he did not think the question so decided as to preclude evidence which was offered, that by the universal usage and understanding of all the bankers and merchants in London the indorsement was bad, as not being signed by both the payees, and the jury, *unâ voce*, declared that that was the usage and understanding, and without hearing any evidence upon the point they found a verdict for the defendant.

(22) *Bull. Nisi Prius*, 279. In the case of two joint traders, an acceptance by one will bind both; but if ten merchants

Sect. 6. — Each partner has in general a power to bind the partnership; and, therefore, a bill or note by one, or an indorsement or acceptance by one, will in general bind all. (23)

And a note by one, importing to be for all, may bind the partnership, though it begin, "I promise." (24)

If a partnership carry on business in the name of one member only, a bill or note by him in his name, or an indorsement or acceptance by him,

employ one factor, and he draw a bill upon them all, and one accept it, this shall only bind him and not the rest. Mar. 2d ed. 16. Beawes, § 228. 1st ed. p. 444. Molloy, b. 2. c. 10. § 18.

(23) *Mason v. Rumsey and another*, 1 Campb. N. P. C. 384. A bill was drawn on "Messrs. Rumsey and Co.;" and T. Rumsey, jun. wrote upon it "Accepted, T. Rumsey, sen." The present action was defended by T. Rumsey, jun. who contended that, even if he were a partner (which he denied), this acceptance would not bind him. Lord Ellenborough told the jury, that if the defendants were partners, they were both bound by this acceptance. He said the word "accepted" alone would have been sufficient, and that the effect could not be altered by the addition of "T. Rumsey, sen." The jury found for the plaintiff; and on motion afterwards for a new trial, on the ground of the evidence of partnership not having been sufficient, the court held the direction right, and refused a rule.

(24) *Lord Galway v. Matthew and another*, 1 Campb. N. P. C. 403. This was an action against the defendants as surviving partners of T. Whitsmith, on a note drawn thus: "Sixty days after date, I pay Ld. Viscount Galway, or order, 200*l.* value received. For J. Matthew, T. Whitsmith, and T. Smithson (Signed) "J. Matthew." Lord Ellenborough held that it bound the whole firm. S. C. 10 East, Rep. 264.

This signature by the one (presuming his authority) is a good signature by all. See *Wilks v. Back*, 2 East, 142.

will bind the firm (25), if the bill, &c. were given upon a partnership transaction : otherwise, not. (26)

(25) *South Carolina Bank v. Case*, 8 Barn. & Cr. 427. Crowder, Clough, and Perfect carried on the business of commission merchants in England and America : in England, under the firm of Crowder, Clough, and Co. ; and in America, in the name of Clough only. The business of each house was to procure consignments for the other. Clough procured a consignment in America for the English house ; and it was arranged between the consignor and Clough, that the former should draw upon a house at New York in favour of Clough, and that Clough should indorse the bills to enable the consignor to get them discounted, and that the consignor should also draw upon the English house to put the New York house in cash to provide for the bills on them : Clough accordingly indorsed in his own name the bills on the New York house, and plaintiffs discounted them ; and Crowder, Clough, and Perfect having failed, plaintiffs claimed to prove under their commission. The Vice-Chancellor directed an issue to try whether the house were indebted to plaintiffs ; and on case, and argument, and time to consider, the court was of opinion that Clough's name was, under the circumstances, to be considered the name of the firm for the purposes of business in America ; that his indorsement, therefore, though in his own name only, was the indorsement of the house, and that the house were consequently liable as indorsers. *Postea* to the plaintiffs.

(26) *Ex parte Bolitho*, 1 Buck. 100. Isaac and Peter Blackburn carried on business near Plymouth in the name of Isaac Blackburn only ; Peter was only a secret partner : Peter carried on a separate business in London. They became bankrupts, and the Bank of England and Down and Co. proved against their joint estate upon bills drawn in the name of Isaac, payable to Peter, and discounted for Peter : the joint creditors petitioned that the proofs against the joint estate might be expunged : it was urged in support of the proof, that as the partnership business was carried on in Isaac's name, the holder of the bills had a claim upon the partnership,

If two trades be carried on at the same place under the same firm, a bill indorsed in the name of the firm by the partners in the one trade, will bind the partners in the other trade, as between them and an innocent holder. (27)

A bill or note by one partner in the name of the firm will, as between them and an innocent holder,

on the ground that the bills were drawn in what was the partnership name: sed per Lord Eldon, "unless you can show that "when Isaac drew the bills, he drew them, not as Isaac, but as "Isaac and Peter, there can be no legal contract upon the bills "against the two: there may be a right of action, if you can "bring it to this, that the money was raised by them for partnership purposes; but this I cannot decide: I must send it to a "court of law." Issues were accordingly directed to try whether Isaac and Peter were jointly liable, 1st, upon the bills, or, 2dly, for money lent.

(27) *Swan and others v. Steele and Wood*, 7 East, 210. The house of Wood and Payne carried on, under the same firm and at the same counting-house, two trades, those of wholesale grocers and cotton dealers. The defendant Steele was a secret partner in the latter trade, but not in the former. The house was indebted to the plaintiffs, as grocers, and to pay this debt, Wood and Payne, without the knowledge of Steele, indorsed to the plaintiffs a bill which they had received on account of the cotton concern. The bill was indorsed in the usual firm of W. and P., and Steele's being a partner was unknown to the plaintiffs. Wood and Payne afterwards became bankrupts, and Payne being dead, this action, by the plaintiffs as indorsees of the bill, was brought against Steele and Wood; and on a case reserved, the only question was, whether the indorsement were good: the court held the case too clear for argument; and Lord Ellenborough said, that in the absence of all fraud on the part of the indorsee, there was no doubt that such indorsement would bind all the partners. *Postea* to the plaintiffs.

bind the firm, though the partner making it were prohibited from drawing bills or notes. (28)

Or though the particular bill or note were a fraud upon the partnership. (29)

(28) *Lord Galway v. Matthew and Smithson*, 10 East's Rep. 264. The defendants and Whitehouse (since deceased) were in partnership as brewers. Matthew applied to the plaintiff to lend his acceptance for 200*l.*, to enable him to pay excise duties due from the house, and promised in return to give the note of the firm payable four days before the acceptance. The plaintiff gave his acceptance, and Matthew drew the note and signed it for himself and partners. He then got the acceptance discounted, and applied 180*l.* in payment of partnership debts, reserving the rest to himself. The plaintiff (after Whitehouse's death) was obliged to take up his acceptance, and now sued the defendants on the note. Matthew suffered judgment by default; but, Smithson proved that the plaintiff, before he took the note, had received notice of an advertisement by him, warning persons not to trust Matthew on his account, and that he would no longer be liable for drafts drawn by the other partners on the partnership account. Lord Ellenborough held, that the plaintiff having taken the note after such warning could not recover, and therefore nonsuited him; and on motion to set aside the nonsuit, the court held it right, and refused a rule.

(29) *Ridley and another v. Taylor*, 19 East's Rep. 175. Ord and Ewbank were linen-drappers and partners. The plaintiffs, in Nov. 1806, sold a cargo of coals to Ewbank for 34*l.* 11*s.*, and Ewbank in May following gave them 5*l.* in part payment, and a promissory note for the balance. The note was dishonoured; and in payment of this balance, Ewbank, on the 7th of Nov. 1807, gave the plaintiffs a bill for 40*l.*, dated 20th of October, 1807, drawn and indorsed by him in the partnership name, and accepted by the defendant. The bill was drawn, indorsed, and accepted before it was produced to the plaintiffs, and it did not appear that they knew that Ewbank's was the hand by which it had been drawn and indorsed. Ewbank afterwards

But, such bills or notes will not bind the partnership as to persons, who, when they took them, knew of the want of authority (28);

Or of the fraud. (30)

If one partner give a partnership bill or note for his own private debt without the knowledge of the partnership, it is a fraud upon the partnership. (30)

applied to the plaintiffs for the difference between the balance due and the 40*l.*, but they refused to pay it, until payment of the note. The bill was dishonoured; and the plaintiffs in their account debited Ewbank for the amount. Ord and Ewbank afterwards became bankrupt, and the plaintiffs now sued the defendant as acceptor. A verdict was found for the plaintiff, subject to the opinion of the court of King's Bench on a case, stating these facts. The court held, that in this case, there being no evidence of covin between the plaintiffs and Ewbank to defraud Ord, and no such gross negligence on the part of the plaintiffs, in not enquiring whether Ewbank had authority to transfer the bill, as to render the transaction fraudulent, the plaintiffs were entitled to recover: and they held, that Ord or Ewbank might have been called to disprove Ewbank's authority. The plaintiffs had judgment for the amount of Ewbank's debt.

(30) *Shirreff v. Wilks and others*, 1 East's Rep. 48. In October, 1795, Bishop and Wilks, who were then partners, became indebted to the plaintiffs for goods sold and delivered. Robson became a partner with Bishop and Wilks in April, 1796, and continued so until the 8th November following, when the partnership was dissolved. On 5th November, 1796, the plaintiffs drew on the partnership for the amount of their demand against Bishop and Wilks, and Bishop accepted the bill in the partnership firm. The plaintiffs now sued the three partners upon this acceptance. Bishop and Robson were outlawed; and Wilks pleaded the general issue. A verdict was found for the plaintiff, subject to the opinion of the court. Lord Kenyon said he did not know how the case came to be reserved,

And in such case, if an action be brought by such creditor, notice need not be given him that the consideration will be disputed; the nature of the transaction is sufficient notice to him.

as he had repeatedly decided the same question at the sittings; the propriety of which decisions had not been canvassed. He said, the consideration of the bill was goods sold to Bishop and Wilks only, when Robson was not a partner. "Then the plaintiffs, knowing this, draw the bill on the three partners, and knowingly take an acceptance from one of them, to bind the other two, one of whom, Robson, had no concern with the matter, and was no debtor of theirs; no assent or knowledge on his part being found. The transaction is fraudulent on the face of it." The other judges concurred. *Postea* to the defendant.

Hope v. Cust, B. R. M. 1774, cit. per Lawrence J. in *Shirreff v. Wilks*, 1 East's Rep. 53. Fordyce traded on his separate account, as well as in partnership with others, and being indebted to Hope on his separate account, gave him a general guarantee in the partnership name for his own debt. Lord Mansfield left it to the jury, whether the taking of the guarantee was, in respect of the partners, a fair transaction; or covinous, with sufficient notice to the plaintiff of the injustice and breach of trust Fordyce was guilty of in giving it. The jury found for the defendant.

See also *Pinkney v. Hall*, 1 Salk. 126. *Ld. Raym.* 175., and *Wells v. Masterman* and another, 2 Esp. N. P. C. 731.

Green v. Deakin, 2 Stark. 348. Hickman owed Green money, and gave him a draft for the amount in the name of himself and his two partners, Deakin and Bickley: neither Deakin nor Bickley knew of the giving this draft, nor had this been done with their concurrence; Green was not apprized that the other partners were ignorant of the transaction, and it was urged that Deakin should have given notice of his intention to dispute the consideration; sed per Lord Ellenborough, "the transaction is intrinsically notice: one partner has no right to bind another without his knowledge by drawing in the partnership name for his private debt." *Nonsuit.*

If one partner accept in the partnership name a bill drawn on the firm by his own separate creditor, for his separate debt (31); or if, for such separate debt, he give a promissory note in the name of the firm (32); it lies upon the creditor to show that his debtor had authority so to give him the joint security of the firm; *primâ facie* the transaction is fraudulent on the part of both debtor and creditor.

If one of several persons who have been in partnership accept a bill in the partnership name after a dissolution of the partnership, the partnership will not be liable even to a *bonâ fide* holder for valuable consideration, if the dissolution took place after the date of the bill and before it became due, and proper means were taken to make the dissolution notorious. (33)

(31) *Shirreff v. Wilks*, *suprà*.

(32) *Green v. Deakin*, *suprà*.

(33) *Wrightson v. Pullan*, 1 Stark. 375. Defendants, Pullan and Hopcroft, had been partners; but, on 13th February, 1815, their partnership was dissolved, and on 14th February notice thereof was published in the Gazette. After this date Taylor and Son drew upon Pullan and Hopcroft, and antedated the bill to 1st February, 1815. Hopcroft accepted this bill in the partnership name; after which, Taylor and Son paid it to plaintiffs for value. It was urged for plaintiffs, that as the bill was dated before the dissolution, and plaintiffs had taken it *bonâ fide* and for a valuable consideration, plaintiffs were entitled to recover upon it; but Lord Ellenborough held, that as the partnership had been dissolved before the bill was drawn, Pullan could not be charged by the subsequent act of Hopcroft: and the court afterwards agreed with him, and refused a motion for a new trial.

And if a dissolution be agreed upon, a person who knows of it cannot charge the partnership with a subsequent acceptance by one of the partners in the partnership name, unless he can prove that the intention to dissolve was abandoned, or that the acceptance was for a partnership transaction, and free from fraud. (34)

But a dissolution will not protect the retiring partners, if they suffer their names to continue on the partnership premises, and the holder of the bill or note took it *bonâ fide*, and for value, and without knowledge of the dissolution. (35)

(34) *Paterson v. Zachariah*, 1 Stark. 71. In an action against A. & B. upon an acceptance by A. in the joint names, they having been in partnership, the defence was, that the acceptance was in fraud of B. after a dissolution to which plaintiff was privy; and it was proved, that before the date of the bill plaintiff had, as attorney, prepared a deed of dissolution, and had sent it for approbation to B.'s attorney; but it did not appear the deed had been executed. *Sed per Lord Ellenborough*: — "You need not labour this; where an intention to dissolve is made known, and the dissolution is in the course of execution, the burthen is on the other side to shew that the intention has been abandoned." *Nonsuit*.

(35) *Williams v. Keats and Archer*, 2 Stark. 290. In an action against defendants as acceptors of a bill, it appeared that they dissolved partnership 18th January, 1817, and that notice thereof was in the preceding night's Gazette; but, that the business (a hatter's) was carried on as usual by Keats, and that the name, "Keats, Archer, and Co." continued over the door till April; that the bill in question, though dated in December, was not drawn till February; that it was then accepted, in the old partnership name, by Keats; and that plaintiffs took it *bonâ fide* and for full value in March. Lord Ellenborough thought

No banking corporation, nor any banking partnership consisting of more than six persons, can issue in London, or within sixty-five miles thereof, any bill or note of such corporation or partnership, payable on demand; nor can they draw upon any person residing in London, or within sixty-five miles of it, any bill of exchange payable on demand, or for less than 50*l.*; nor can they borrow, owe, or take up in London, or within sixty-five miles thereof, any sum of money on any bill or promissory note of such corporation or copartnership, payable on demand or at any less time than six months from the borrowing thereof; and if they do, they are liable to the penalty of 50*l.* for each offence. (36)

And they are not at liberty to issue such bills or notes in England beyond the limited distance, except under certain restrictions.

Those restrictions are, that such bills or notes shall be payable at some place or places specified thereon, exceeding such limited distance; that the corporations or partnerships issuing them shall have no house of business or establishment, as bankers, in London or within sixty-five miles thereof; and that every member of such corporation or partner-

Archer's permitting his name to remain over the door was notice of a continuance of the partnership; and as there was no proof that plaintiffs knew of its dissolution when they took the bill, they had a right to recover: and they had a verdict accordingly.

(36) 7 G. 4. c. 46. set out in the Appendix.

ship shall be responsible for the due payment of all bills and notes issued by such corporation or partnership, such person being a member at the date of the bills or notes, or becoming so before they are payable, or while any sum of money on any such bills or notes is owing or unpaid; that they shall deliver in an account at the Stamp Office according to 7 G. 4. c. 46. before they begin to issue any bills or notes, and that they shall be subject to certain regulations that act specifies.

The Stamp Office account, which is to be in the form the schedule points out, is to set forth the true names, title, or firm, of such corporation or copartnership; the names and places of abode of all the members of such corporation or copartnership, as the same shall respectively appear in their books; the name and firm of every bank established by them; and also the names and places of abode of two members, resident in England, who shall have been appointed public officers of the corporation or copartnership; together with the title of office or other description of every such public officer respectively, in the name of any one of whom such corporation shall sue and be sued, as thereafter is provided; and also the name of every town and place where any of the bills and notes of such corporation or copartnership shall be issued.

This account is to be made out and verified upon oath by the secretary, or one of the public officers appointed as aforesaid; is to be delivered to the commissioners of stamps, at the Stamp Office in

London, to be there filed; is to be renewed every year between 28th February and 25th March; and a copy, certified to be such under the hand of one or more of the commissioners of stamps, shall, upon proof of his or their handwriting, and without proof of his or their being a commissioner or commissioners, be proof of the appointment and authority of the public officers named in such account, and that all persons named therein as members were members at the date of such account.

A further account is also to be delivered in within the year, if there be any change in the officers or members.

A neglect to make out and deliver this account in the first instance, or to renew it yearly within the specified days, subjects the corporation or copartnership to a forfeiture of 500*l.* per week for every week they shall neglect to make it: if the secretary or other officer make out or sign a false account, or an account not truly setting forth all the particulars required, the corporation or copartnership is liable to a penalty of 500*l.*, and the secretary or other officer so offending shall forfeit 100*l.*; and if the secretary or other officer shall knowingly and wilfully make a false oath of and concerning the matters to be specified and set forth in such account, he shall be liable to the pains of wilful and corrupt perjury.

All actions and suits by any such (37) copartner-

(37) The word "corporation" is omitted in this and several other clauses: query, whether by design or accident?

ship, against members or others, shall, and lawfully may, be commenced and prosecuted in the name of one of the public officers nominated as aforesaid; all actions and suits against any such copartnership, by members or others, shall, and lawfully may, be commenced against one or more of such public officers; all indictments and prosecutions, on behalf of such copartnership, shall, and lawfully may, be preferred and carried on in the name of any one of such public officers, and it shall be lawful and sufficient to describe the property of the copartnership as the property of any of the public officers; and an intent to injure or defraud any such copartnership shall, and lawfully may, be laid in any indictment as an intent to injure or defraud any one of such public officers; and the death, resignation, removal, or any act of such public officer shall not prejudice any action or other proceeding, ut the same may be continued in the name of any other of the public officers of such copartnership.

There is to be only one action or suit against any such corporation or copartnership, in respect of one demand, in case the merits shall have been tried in such action or suit; and the proceedings therein may be pleaded in bar of any further action or suit for the same demand.

A decree in a court of equity against such public officer of such copartnership shall have the like effect against the property and funds of the copartnership, and against the person and property of every member, as if every such member were

parties before the court, and every judgment against any public officer of any such co-partnership shall have the like effect upon the property of such co-partnership, and upon the property of every member thereof, as if the judgment had been obtained against such co-partnership : and the bankruptcy, &c. of such public officer in his individual capacity is not to be deemed the bankruptcy, &c. of such co-partnership, but the partnership and every member thereof, and the effects of the co-partnership, and of every member thereof, shall be liable to the claims of the creditors, as if there had been no such bankruptcy, &c.

Execution upon any judgment in an action against any such public officer, may be issued against any member or members for the time being, of such corporation or co-partnership ; and if such execution against any member or members for the time being be ineffectual for obtaining satisfaction, execution may be issued against any person or persons, who was or were a member or members at the time when the contract or the engagement, on which such judgment was obtained, was entered into, or who became a member at any time before such contracts or engagements were executed, or was a member at the time of the judgment obtained : provided that no execution, as last mentioned, shall be issued without leave first granted, on motion in open court, by the court in which such judgment shall have been obtained ; and such motion shall not be made except on notice to the person sought to be

charged, nor after the expiration of three years after he shall have ceased to be a member.

The public officer in whose name a suit or action shall have been commenced or defended, and the person against whom execution upon any judgment shall be issued, is to be indemnified out of the funds of the co-partnership, or, in failure thereof, by contributions from the other members of such co-partnership, as in the ordinary cases of co-partnership.

And if any such corporation or co-partnership issue or reissue in London, or at any place not exceeding sixty-five miles from London, any bill or note of such corporation or co-partnership payable on demand, or drawn on any person resident in London, or at any place not exceeding sixty-five miles from London, any bill of exchange payable on demand, or for less than 50*l.*; or if they issue any of their bills or notes, contrary to 39 & 40 G. 3. c. 28., save as provided by this act; such co-partner or co-partners shall forfeit for every such offence 50*l.* (38)

Before this statute the different bank acts contained prohibitions as to partnerships consisting of more than six persons (39); and it had been held that those prohibitions did not extend to any but banking partnerships. (40)

(38) 7 G. 4. c. 46. s. 19.

(39) 6 Ann. c. 22. s. 9.—15 G. 2. c. 13. s. 5.—21 G. 3. c. 60. s. 12.—39 & 40 G. 3. c. 28.

(40) *Wigan v. Fowler*, 1 Stark. 459. In an action against seven partners, as makers of a promissory note for 1000*l.* pay-

At least, a common partnership could not have made this a defence against an innocent holder, who was ignorant of what number the firm consisted.(41)

Corporations are mentioned in the statute of Anne, as persons who may make or indorse notes, and to whom notes may be payable; and as it gives the like remedy to and for corporations and others as upon inland bills of exchange, it implies, that by the custom of merchants they might, in some cases at least, draw, indorse, accept, or sue upon, bills of exchange.

But if the being parties to bills or notes were inconsistent with the purpose for which they were incorporated, that inconsistency might be a bar to

able three months after date, the defence was, that the bank acts made this note void: the number of partners did not appear upon the face of the note, nor was there any evidence that plaintiff knew it. Lord Ellenborough thought at the trial, that the bank acts applied to banking partnerships only, and it was with reluctance he saved the point. On motion to enter a nonsuit, he adhered to his original opinion; and it was noticed that plaintiff did not appear to have known how many partners there were when he took the note: the rule was refused.

Perring v. Dunston, 1 Ryan and M. 426. In an action upon a note, it appeared to be made by seven persons, and it was insisted that it was therefore void as an infringement of the privilege granted to the bank by 21 G. 3. c. 60. s. 12; but, Best C. J. thought, that taking all the bank acts together, the object of the legislature was to give protection against rival banks only: and it not appearing that this note had any relation to persons in partnership for the purposes of banking, plaintiff had a verdict, but it was by consent, and for defendant's proportion only.

(41) *Wigan v. Fowler*, *supra*.

any remedy by, or through, or against them, on a bill or note.

And where a corporation is empowered by statute to raise money by notes for a special purpose, if it issue notes without stating therein that they were given for that purpose, the corporation may resist payment, on the ground that they were given for another purpose. (42)

And this will be a defence even against an innocent indorsee. (42)

The Royal Bank of Scotland has power to issue notes. The power is sufficiently recognised by 48 G.3. c.149. s.14. and 55 G.3. c.184. s.23. (43)

And this is the case also with the Bank of Scotland; (44)

And with the British Linen Company in Scotland. (44)

(42) *Slark v. Highgate Archway Company*, 5 Taunt. 792. Defendants were incorporated by 52 Geo. 3. c.146. (local and personal) and authorised to borrow money to complete their works: they gave a note under their common seal at two months after date for 1000*l.*, payable to Nash or order; it did not import to be for money borrowed to complete their works. Plaintiff sued thereon as indorsee. Defence, that it was given for Nash's accommodation, not to complete their works. Gibbs C. J. thought this no defence against an innocent indorsee who had paid the value, and the plaintiff had a verdict; but, on a rule nisi for a new trial, the Court of Common Pleas, without assigning their reasons, granted a new trial.

(43) *Vide post.*

(44) *Rex v. M'Keay*, Pasch. 1826. Prisoner was indicted for disposing of a forged *l.* note of the Royal Bank of Scotland. A charter was proved enabling the bank to increase its capital,

Sect. 7.—Where a bill or note is drawn by an agent, executor, or trustee, he should take care, if he mean to exempt himself from personal responsibility, to use clear and explicit words to show that intention.

Thus, if a broker sell goods, and draw upon the buyer in favour of his principal, he will be liable upon the bill, if it be dishonoured, unless he use special words to prevent it; (45)

And may be sued thereon by his principal. (45)

So, if an agent for A. draw upon B. in favour of C., though he direct B. to place the amount to A.'s debit, he will be personally liable to C., if the bill be not paid, unless he use proper words to prevent such liability. (46)

And this, though C. knew he was only agent. (46)

and a clerk proved that the bank was in the constant habit of issuing such notes, but no charter was proved giving them such power: on referring to 48 Geo. 3. c. 149. s. 14. and 55 Geo. 3. c. 184. s. 23., Hullock B., who tried the prisoner, thought such power was sufficiently recognised by those statutes, and the other judges agreed with him.

(45) *Lefevre v. Lloyd*, 5 Taunt. 749. Defendant, as broker, sold cotton for plaintiff at two months' credit, and drew on the seller for the amount in favour of plaintiff: the bill being dishonoured, plaintiff sued defendant on the bill; and Gibbs C. J. at the trial, held, that as defendant had put his name upon the bill, however imprudent that was, all the legal consequences of that act attached upon him, and verdict for plaintiff: and on motion for a new trial, the Court agreed with him; for by drawing the bill, defendant removed from plaintiff all consideration of the buyer's responsibility. Rule refused.

(46) *Leadbitter v. Farrow*, Michaelmas, 1816, in B. R. Plaintiff wanted a bill upon London for 50*l.*, and sent to defendant,

So, if drainage or inclosure commissioners draw upon the banker appointed by the act, they may be personally liable, unless they use proper words to prevent it; though the bill import to be drawn on the drainage or inclosure account, and direct the money to be placed to their account as commissioners. (47)

So, if a bill be addressed to a man as cashier of a particular company, though it direct him to place it to the company's account, an acceptance upon it by

whom he knew to be agent to the Durham Bank at Hexham; defendant drew a bill accordingly, "Pay to the order of Mr. Leadbitter 50*l.*, value received, which place to the account of the Durham Bank, as advised, C. Farrow. To Messrs. A. and B. London." In an action thereon, the defendant urged that he was not personally liable, or at least that the plaintiff, who knew him to be only agent, could not sue him; but, on a case reserved, the court held his signature pledged his own credit, and *that* only, and that he was therefore liable.

(47) *Eaton v. Bell*, Michaelmas, 1821. 5 B. and Ald. 34. Defendants were inclosure commissioners, and plaintiff the banker under the act: the act authorised the commissioners to raise money by rate, and directed that persons advancing money for the purposes of the act should be repaid with interest out of the monies the commissioners should raise: defendants drew on plaintiff in this form: "Messrs. E. — Pay A. or bearer, "40*l.* on account of the public draining, and place the same to "our account as commissioners of the Frodsham inclosure:" Plaintiff sued defendants personally; and Dallas C. J. left it to the jury whether credit was given by plaintiff to defendants personally, or to the fund they had to raise: the jury thought it given to defendants personally; and, on case, the court thought them right, and plaintiff had judgment.

him will bind him personally, unless he use special words to prevent it. (48)

So, if an agent employed to buy bills get them payable to himself, and indorse them generally, he will be liable upon that indorsement even to his own employer (49): to have exempted himself he should have got the bills made payable to his employer, or

(48) *Thomas v. Bishop*, Str. 955. A bill for 200*l.* was drawn upon the defendant by the description of "Mr. H. Bishop, cashier of the York Buildings Company, at their house in Winchester-street, London;" and the bill directed him to place the 200*l.* to the account of the company. The defendant accepted the bill; but, on being sued, insisted that the acceptance did not bind him personally, and gave in evidence that the letter of advice from the drawer of the bill was sent to the company. But Page J. directed the jury to find for the plaintiff, which they did; and upon a rule to show cause why there should not be a new trial, the whole court held the direction right; that the addition to the defendant's name was only to describe him with more certainty, and to point out where he was to be found; that the direction to place the money to the account of the company was for the use of the drawee only; and that the letter of advice could not vary the case against an indorsee (which the plaintiff was), because an indorsee could only look to the bill itself.

(49) *Goupy v. Harden*, Holt, 342. 2 Marsh. 404. 7 Taunt. 159. Plaintiff employed defendant at a commission of 10*s.* per cent. to procure him bills on Portugal, and to transmit them to him in Paris: defendant got bills payable to his own order, and indorsed them generally, without restriction; plaintiff afterwards sued him on this indorsement, and defendant insisted that, under the circumstances, this indorsement did not make him liable to plaintiff; but, on rule nisi to set aside verdict for plaintiff, the court thought it did; for, had defendant meant to exclude his liability, he should have given a qualified indorsement: rule refused.

should have introduced into his indorsement words to exclude his personal responsibility.

But, if a man employed to get a bill discounted be unable to effect it without indorsing it, though he bind himself to the indorsee, he will be intitled to be indemnified by his employer. (50)

Though his employer's name be not upon the bills. (50)

If a bill or note import to be drawn, accepted, or indorsed, by procuration, it will not bind the principal unless it be within the agent's power. (51)

(50) *Exparte Robinson*, 1 Buck. 113. Nunn and Barber employed Watson and Co. to get bills of Nunn and Barber discounted. Nunn and Barber's names were not upon the bills, and Watson and Co. were obliged to indorse them: both houses became bankrupts, and demands having been made upon Watson and Co.'s indorsements, their assignees claimed against the estate of Nunn and Barber; and upon hearing, Lord Eldon thought Nunn and Barber's estate liable to relieve that of Watson and Co.: he allowed them to make a claim, directed that a dividend upon their claim should be reserved, and referred it to the commissioners to say for what sum they ought to prove, with liberty to state any special circumstances.

(51) *Atwood v. Munnings*, 7 B. & Cr. 278. Defendant gave his wife one power of attorney, authorising her, amongst other things, for him and in his name and to his use, to indorse and negotiate bills. He afterwards gave her another power, to pay and accept bills drawn by his agent as occasion should require. Defendant was in a house of trade with several partners. Burleigh acted here as defendant's agent, and he acted also as agent for the house. He drew upon defendant for money owing by the house, and defendant's wife accepted the bill. Plaintiff discounted it, and on case, the question was, whether the wife's acceptance was warranted by the powers. The three judges thought it was not; for, Burleigh did not draw this bill in the

Therefore, whoever takes a bill upon an indorsement by procuration should satisfy himself that the agent has power to indorse; he should look to his powers for that purpose. (52)

Otherwise, he may be unable to enforce payment; (52)

And may even be liable to refund if payment has been made to him, (52)

Or to any subsequent holder. (52)

But, a defect in the power of the agent will not subject an innocent holder to refund, if he has obtained payment; (52)

Especially if the person paying inspected the power before he paid, (52)

And the holder had no opportunity of so doing. (52)

character of defendant's agent, and, the acceptance importing to be by procuration, plaintiffs should have satisfied themselves it was within the wife's authority. *Postea* to defendant.

(52) *East India Company v. Tritton*, 3 Bar. & Cr. 280. Three bills upon the East India Company were payable to Hope or order: they got into the possession of Card, who indorsed them "by procuration for Hope." Card had a power of attorney from Hope, but it was not sufficient to warrant these indorsements. From Card the bills passed to Davies and Card, and they indorsed them to defendants, their bankers: the Company required to see Hope's power to Card, and it was shown them, and they registered it in their books: the bills were afterwards presented for payment by defendants, the Company paid them, and Davies and Card drew the money from defendants. Hope's representatives afterwards enforced payment over again from the Company, on the ground that Card's indorsement was unauthorised: and the Company then

Sect. 8.—If a man draw a bill or note as executor of J. S., and sign it in terms as such, yet if it be in a form which implies assets, or will procure forbearance, it will bind him personally. (53)

If an executor mean, to limit his responsibility, he should confine his stipulation, viz. to pay out of the estate; and if an executor indorse, it binds him personally. (54)

sued defendants, on the ground that they were to be taken to have vouched for the validity of Card's indorsement. But on special verdict, the Court held, that defendants could not be taken to have given any such voucher; that they were at least equally innocent with plaintiffs, and then, it not being against conscience in them to retain the money, they were not liable to refund it; and, in truth, blame was rather imputable to plaintiffs; for plaintiffs saw the power, and had the opportunity of judging what it authorised, and defendants did not appear ever to have seen it. Judgment for defendants.

(53) *Childs v. Monins and Bowles*, 2 Brod. and Bingh. 460. Defendants signed this note, "As executors to J. S. we severally and jointly promise to pay plaintiff 200*l.* on demand, together with interest:" they were sued thereon, and then contended that it only bound them as executors; but on demurrer, the Court were clear it bound them personally: it admitted assets, and tended to procure forbearance, and as a several note from each, would bind the executor of whoever died first, and ultimately the executors of both; an effect it would not have if it bound them as executors only.

(54) *King v. Thom*, 1 Term Rep. 487. The court held, that upon a bill payable to several as executors, they might sue as executors: and, per Buller J., "if they indorse, they are liable personally, and not as executors; for, their indorsement would not give an action against the effects of the testator."

Sect. 9. — It is no objection to a bill or note, that it is payable or indorsed to a person who at the time it was given was an alien enemy, if it were given to him in his own country by a British subject who was then a prisoner there. (55)

And it is no objection to an action on such a bill, that it is brought as to part in trust for an alien enemy. (56)

So, it is no objection to an action on such a bill that it was given whilst an act of parliament was in force which made it penal to pay such bills, if after the act expired there were a promise to pay it. (57)

(55) *Antoine v. Morshcad*, 6 Taunt. 237. Sir John Morshead, Tyndall, and Estwick, were prisoners of war at Verdun in France. Sir John Morshcad drew bills on defendant, some payable to Tyndall, and some to Estwick; they indorsed them to plaintiff, a banker at Verdun. Defendant accepted them; but on being sued thereon at the return of peace, he insisted that the indorsement, as being during war, was void: Gibbs C. J. thought otherwise; and on motion for a new trial, the whole Court agreed with him, and the plaintiff recovered.

(56) *Daubuz v. Morshead, bart.* 6 Taunt. 332. Indorsce against acceptor on bills drawn by an English prisoner in France in favour of Borau Basti, and indorsed to plaintiff; defence, that plaintiff was only a trustee, except as to a small part, for an alien enemy: but Gibbs C. J. thought plaintiff entitled to a verdict for the whole; and verdict accordingly.

(57) *Duhammel v. Pickering*, 2 Stark. 90. Defendant was a prisoner of war in France in 1795, and drew four bills on Wishaw in England, payable to La Tailleux, an alien enemy residing in France: by 34 G. 3. c. 9. s. 4. if any person paid any bill drawn in France during the war, he was liable to forfeit double value, and the payment was annulled. On the peace in 1802, defendant wrote to La Tailleux's agent, promising payment: this action was brought by La Tailleux's administrator.

It was insisted that the statute was a bar to plaintiff's claim ; and Lord Ellenborough said, no doubt the bills were void in their creation as bills to be enforced in this country, but they might constitute the basis of a promise on the return of peace ; and he thought the promise in defendant's letter removed all doubt on the subject ; and plaintiff had a verdict for principal and interest.

C A P. III.

- SECT. 1. *Of the Stamp upon a Bill or Note, and consequence of neglect to have Stamp thereon.*
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THE paper, parchment, vellum, or other matter, whereon a bill or note made in Great Britain is written, must, except in a few instances, be stamped (1) before the bill or note is written ; otherwise, the

(1) The last stamp act, namely, 55 Geo. 3. c. 184., does not in terms require that the paper, &c. should be stamped before the bill or note is written thereon ; but by 31 Geo. 3. c. 25. s. 19. it is enacted, That all vellum, parchment, and paper, liable to any stamp duty by that act, shall, before any of

(2) party making, signing, or issuing it, or causing it to be made, signed, or issued, or accepting or

the matters or things thereby charged shall be engrossed, printed, or written thereupon, be brought to the head office for stamping vellum, parchment, or paper; and the commissioners, by themselves, or by their officers employed under them, shall and may, from time to time, stamp and mark any quantities or parcels of vellum, parchment, or paper, before any of the matters or things thereby charged shall be engrossed, printed, or written thereupon, upon payment of the several duties payable for the same by virtue of this act. And no bill of exchange, promissory note, or other note, draft or order, liable to the duties by this act imposed, or any of them, shall be pleaded or given in evidence in any court, or admitted in any court to be good, useful, or available in law or equity, unless the vellum, parchment, or paper, on which such bill of exchange, promissory note, or other note, draft or order, shall be engrossed, printed, written, or made, shall be stamped or marked with a lawful stamp or mark, to denote the rate or duty as by that act is directed, or some higher rate or duty in that act contained; and it shall not be lawful for the said commissioners, or their officers, to stamp or mark any vellum, parchment, or paper, with any stamp or mark directed to be used or provided by virtue of that act, at any time after any bill of exchange, promissory note, or other note, draft or order, shall be engrossed, written, or printed thereon, under any pretence whatever. And by 55 Geo. 3. c. 184. s. 3. the commissioners are authorised to do all things necessary for carrying that act into execution, in the *like* manner as former commissioners have been authorized to do, for carrying into execution former acts; and by s. 8. all powers, provisions, clauses, regulations and directions, relating to former duties, are extended to the duties by that act imposed. The 34 Geo. 3. c. 32. authorising the commissioners to stamp bills &c. after they were drawn, on payment of a certain penalty, was only a temporary act and has long since expired.

(2) By 55 Geo. 3. c. 184. s. 11. it is enacted, That if any person or persons shall make, sign, or issue, or cause to be

paying it, or causing or permitting it to be accepted or paid, will be liable to a penalty of 50*l.*, and the bill or note will (3) not be available in law or equity. It will not be available even in the hands of an innocent holder, who gave full value for it. (4)

And no laches by the holder will make such unstamped bill or note amount to payment of a prior

made, signed, or issued, or shall accept or pay, or cause or permit, to be accepted or paid, any bill of exchange, draught or order, or promissory note for the payment of money liable to any of the duties imposed by that act, without the same being duly stamped for denoting the duty thereby charged thereon, he, she, or they, shall, for every such offence forfeit the sum of 50*l.*

(3) See 31 Geo. 3. c. 25. s. 19. *suprà*, p. 60. By 55 Geo. 3. c. 184. s. 8, all the powers, provisions, clauses, regulations and directions, fines, forfeitures, pains and penalties, contained in and imposed by the several acts of parliament relating to the duties hereby repealed, and the several acts of parliament relating to any prior duties of the same kind and description, shall be of full force and effect, with respect to the duties hereby granted, and to the vellum, parchment, and paper instruments, matters and things charged, or chargeable therein, as far as the same are or shall be applicable, in all cases not hereby expressly provided for; and shall be observed, applied, enforced, and put in execution, for the raising, levying, collecting, and securing of the said duties hereby granted, and otherwise relating thereto, so far as the same shall not be suspended by, and shall be consistent with, the express provisions of this act, as fully and effectually, to all intents and purposes, as if the same had been herein repeated, and specially enacted with reference to the said duties hereby granted.

(4) *Ex parte Manners*, post. 84.

debt (5); even though the bill, but for such laches, would have been paid. (5)

But an unstamped bill or note may be looked at for a collateral purpose; as to judge whether the party signing it was drunk or sober at the time. (6)

And the forging a bill or note on unstamped paper, or uttering such bill or note with knowledge of its being forged, and with an intent to defraud, is as much an offence as if the bill or note were on paper duly stamped. (7)

(5) *Wilson v. Vysar*, 4 Taunt. 228. Action for goods sold; defence, payment. Defendant had indorsed to plaintiff a bill for the amount, and plaintiff had neglected to present it for payment. The bill appeared to be upon a stamp of less than the proper amount, but defendant proved that it would nevertheless have been paid by the acceptor, had it been presented: Mansfield C. J. held at the trial, that the defect in the stamp precluded the defendant from having this considered as payment; and the court, on motion, concurred; and rule refused.

(6) *Gregory v. Frazer*, 3 Campb. 454. In an action for money lent, the defence was that defendant was drunk at the time, and imposed on by plaintiff; and plaintiff having produced an unstamped note which defendant gave for the money at the time, it was made a question whether the note could be looked at to strengthen or repel the imputation of drunkenness, and Lord Ellenborough held it might; he said it could not be produced in evidence as a security, or to prove the loan, but he thought it might be looked at as a contemporary writing to prove or disprove the fraud; it was accordingly put in, and having the appearance of being written by a drunken man, verdict for defendant.

The bill was probably looked at at plaintiff's instance.

(7) *Rex v. Hawkeswood*, Pasch. 1783. The prisoner was convicted of forging a bill of exchange; the bill was on unstamped paper. Buller J. thought the stamp acts mere

Sect. 2.—A note payable to the bearer on demand, made, or purporting to be made, out of Great Britain, or purporting to be made by or on the behalf of any person resident out of Great Britain, (except where made and payable in Ireland only,) (8) cannot be negotiated, circulated, or offered or taken in payment, or offered for payment or

revenue laws, and that what was forgery before those laws was forgery still; and on the point being saved, the judges all concurred that the want of a stamp was no objection.

See *Rex v. Teague*, Mich. 1802. post.

(8) By 55 Geo. 3. c. 184. s. 29. it is enacted, That from and after the passing of this act, promissory notes for the payment of money to the bearer on demand, made out of Great Britain, or purporting to be made out of Great Britain, or purporting to be made by or on the behalf of any person or persons resident out of Great Britain, shall not be negotiable, or be negotiated, or circulated, or paid, in Great Britain, whether the same shall be made payable in Great Britain or not, unless the same shall have paid such duty, and be stamped in such manner as the law requires for promissory notes of the like tenor and value made in Great Britain: and if any person or persons shall circulate or negotiate, or offer in payment, or shall receive or take in payment, any such promissory note, or shall demand or receive payment of the whole, or any part, of the money mentioned in such promissory note, from or on account of the drawer thereof in Great Britain, the same not being duly stamped as aforesaid; or if any person or persons in Great Britain shall pay, or cause to be paid, the sum of money expressed in any such note, not being duly stamped as aforesaid, or any part thereof, either as drawer thereof, or in pursuance of any nomination or appointment for that purpose therein contained, the person or persons so offending shall for every such offence forfeit the sum of 20*l.*: Provided always, that this clause shall not extend to promissory notes made and payable only in Ireland.

paid here, unless it be stamped in like manner as a note of the same tenor and value made in Great Britain, under a penalty upon the party offending therein of 20*l*.

Before this provision, a note made in (9) any part of the King's foreign dominions, (as Jamaica) where by law a stamp was necessary, could not have been received in evidence here, unless it had such stamp as the law of that country was proved to require.

Sect. 3.—A bill drawn in Ireland with blanks for sum, date, and drawee's name, and transmitted to England to have the blanks filled up, though it may require an Irish stamp, will not require an English one. (10)

(9) *Alves v. Hodgson*, 7 Term Rep. 241. A note was produced in evidence, which had been made in Jamaica; the defendant objected that it ought to have been stamped, and proved the law of Jamaica requiring a stamp. Lord Kenyon thought the objection good, but suffered the plaintiff to take a verdict, with liberty to the defendant to move to enter a nonsuit. In shewing cause against a rule nisi obtained for such purpose, it was urged that the defendant could not avail himself of an objection founded on a revenue law of a foreign country; but Lord Kenyon said, "I think we must resort to the laws of the country in which the note was made, and unless it be good there, it is not obligatory in a court of law here. But as the plaintiff might have recovered, without this note, on the quantum meruit, let there be a new trial."

(10) *Snaith v. Mingay*, 1 Maule and Sel. 87. Bayley and Co. of Waterford, in Ireland, had one partner, Wallace, resident in

Sect. 4. — If a bill upon which a person residing abroad is intended to be drawer, be sketched out and accepted here, and then transmitted to such person abroad that he may sign his name as drawer, this is to be considered a foreign bill, and does not require an English stamp. (11)

And the acceptor is liable upon it though it be unstamped. (11)

Sect. 5. — If upon a bill dated abroad the defence be that it was made in England, and has not an

England, where he carried on a separate trade, and he was restrained by the articles of partnership from drawing bills in the partnership name; they sent him over four signatures made by them as drawers and indorsers on copper-plate impressions, with blanks for dates, sums, and drawees' names; they were to be used by him in his separate trade, and he filled them up and used them accordingly. They were on Irish stamps only; and in an action upon them against the second indorser, it was objected that they ought to have had English stamps; but on a case reserved, the court thought otherwise; because, they were *bonâ fide signed* in Ireland, and therefore were to be considered as *made* there.

(11) *Boehm v. Campbell*, Gow. 56. 8 Taunt. 679. In an action by drawer against the guarantee of an acceptor, it appeared that the plaintiff lived at Antwerp; that the whole of the bill, except plaintiff's signature, was written here; that the bill was accepted before plaintiff signed it; that it was then transmitted to plaintiff for his signature, and that he signed it at Antwerp. It had no stamp, and it was urged that it was to be considered as made here and should have had a British stamp; but Dallas C. J. thought it was to be considered as made where it was

English stamp, that defence ought to be made out by distinct evidence; because such conduct to evade the stamp duties would be a very serious offence. (12)

Proof that the drawer was in London so near the date of the bill, that it could not have been drawn on the day of the date at the place from which it is dated, is not sufficient. (12)

But, if the fact of its being made in England be satisfactorily proved, it will prevent even a bonâ fide holder for valuable consideration from recovering upon it. (13)

drawn, and that it was not to be considered as drawn till the plaintiff signed it; and plaintiff had a verdict.

(12) *Abraham v. Dubois*, 4 Campb. 269. Action on bill dated Paris, 1st March; defence, that it was drawn in London, and proof that the drawer was in London 3d March, at eleven in the forenoon. Per Lord Ellenborough: "It is not very probable this bill was drawn in Paris 1st March; but if it were proved ever so distinctly, that it was not drawn in Paris 1st March, it would not follow that it was not drawn there at some other time, or that it was drawn in England. Drawing here with a foreign date, to evade the stamp duties, is a very serious offence, and the fact must be made out by distinct evidence. Verdict for plaintiff.

(13) *Ex parte Manners*, *In re Voss*, 1 Rose, 68. The Lincoln Bank took for valuable consideration and without notice two unstamped bills of exchange, one dated at Haerlem, and the other at Amsterdam: the acceptor having become bankrupt, the Lincoln Bank offered to prove under the commission; but, upon proof that the bills were really drawn in London, they were not allowed to prove: on petition, Lord Eldon C. thought the proof properly refused, and the petition was dismissed.

Sect. 6. — The following bills and notes need not be stamped, namely,

Bills and notes which are issued by the (14) Bank of England.

Bills drawn pursuant to certain acts of parliament for the (15) pay and expenses of the army and navy.

Bills drawn for the payment of less than forty shillings.

Notes for one pound, one guinea, two pounds, and two guineas, payable to the bearer on demand, issued by (16) the Bank of Scotland, Royal Bank of Scotland, or the British Linen Company in Scotland.

Notes payable in any other manner than to the bearer on demand, for less than forty shillings.

All drafts or orders for the payment of money to the bearer on demand, drawn in Great Britain upon any (17) banker, or person acting as a banker, and residing or transacting the business of a banker within fifteen miles of the place where they are issued; provided they specify such place, and bear date on or before the day on which they are issued, and do not direct payment to be made by bills or notes.

(14) See 55 Geo 3. c. 184. s. 21. The bank is to pay 3500*l.* per million, for the notes and bank-post bills they issue, and at that rate per half million.

(15) See the exemptions from duties on bills, post. p. 90. n.

(16) See 55 Geo. 3. c. 184. § 23.

(17) See the exemptions from duties on bills, post. p. 90. n.

86 *Stamps.—Frauds as to Draughts, &c.* [Chap.III.

And by 9 Geo. 4. c. 23. persons carrying on the business of bankers in England (except in London or within three miles thereof), having first obtained a licence and given security, may issue, on unstamped paper, notes for any sum amounting to 5*l.* or upwards, expressed to be payable to the bearer on demand, or to order, at any period not exceeding seven days after sight, and bills of exchange expressed to be payable to order on demand, or at any period not exceeding seven days after sight, or twenty-one days after date; provided such bills are drawn on a person carrying on the business of a banker in London, Westminster, or Southwark, or provided they be drawn by a banker at a town or place where he is duly licensed to issue unstamped notes and bills under that act, upon himself or partner, payable at any other town or place where he shall be duly licensed to issue such bills or notes.

But, any banker licensed for the purpose, and issuing unstamped promissory notes for payment of money to the bearer on demand, shall issue all his notes for payment of money to the bearer on demand upon unstamped paper.

And by 7 Geo. 4. c. 46. s. 16. corporations or copartnerships carrying on the business of bankers under that act, being desirous of issuing and re-issuing notes in the nature of bank-notes payable to the bearer on demand, without their being stamped, are entitled so to do upon giving such security as that act specifies; and they are not obliged to take out more than four licences for any number of

places in England; the fourth licence specifying all the places not mentioned in the other three.

Sect. 7. — And any person, under colour of this last exemption, making or issuing, or causing to be made or issued, any bill, draft or order (18) post-

(18) By 55 Geo. 3. c. 184. s. 13. For the more effectually preventing of frauds, and evasions of the duties hereby granted on bills of exchange, drafts or orders, for the payment of money, under colour of the exemption in favour of drafts or orders upon bankers, or persons acting as bankers, contained in the schedule hereunto annexed, it is enacted, That if any person or persons shall, after the thirty-first of August, 1815, make and issue, or cause to be made and issued, any bill, draft or order, for the payment of money to the bearer on demand, upon any banker or bankers, or any person or persons acting as a banker or bankers, which shall be dated on any day subsequent to the day on which it shall be issued, or which shall not truly specify and express the place where it shall be issued, or which shall not in every respect fall within the said exemption, unless the same shall be duly stamped as a bill of exchange according to this act, the person or persons so offending, shall, for every such bill, draft, or order, forfeit the sum of 100*l.*; and if any person or persons shall knowingly receive or take any such bill, draft or order, in payment of, or as a security for, the sum therein mentioned, he, she, or they, shall, for every such bill, draft or order, forfeit the sum of 20*l.*; and if any banker or bankers, or any person or persons acting as a banker, upon whom any such bill, draft or order shall be drawn, shall pay, or cause or permit to be paid, the sum of money therein expressed, or any part thereof, knowing the same to be post-dated, or knowing that the place where it was issued is not truly specified and set forth therein, or knowing that the same does not, in any other respect, fall within the said exemption, then the banker or bankers,

dated, or not falling in every respect within such exemption, and not stamped as a bill of exchange, will be liable to a penalty of 100*l.*; the person knowingly receiving or taking it will be liable to a penalty of 20*l.*; and the banker, or other person, knowingly paying, or causing or permitting it to be paid, will be liable to a penalty of 100*l.*, and will not be allowed the money paid on it in account.

Sect. 8. — On other bills and notes, the proper stamps, as regulated by the (19) act of the

or person or persons, so offending, shall, for every such bill, draft or order, forfeit the sum of 100*l.*; and, moreover, shall not be allowed the money so paid, or any part thereof, in account against the person or persons by or for whom such bill, draft or order shall be drawn, or his, her, or their executors or administrators, or his, her, or their assignees or creditors, in case of bankruptcy or insolvency, or any other person or persons claiming under him, her, or them.

See *Allen v. Keeves*, 1 East, Rep. 435. and *Whitwell v. Bennett*, 3 Bos. and Pull. 559.

(19) By 55 Geo. 3. c. 184. (the first section of which repeals all former stamp duties on bills and notes) s. 2. it is enacted, That there shall be raised, levied, and paid, unto and for the use of his Majesty, his heirs and successors, in and throughout the whole of Great Britain, for and in respect of the several instruments, matters, and things mentioned and described in the schedule thereunto annexed, (except those standing under the head of exemptions,) or for or in respect of the vellum, parchment, or paper, upon which such instruments, matters, and things, or any of them, shall be written or printed, the several duties or sums of money set down in figures against the same

55 Geo. 3. c. 184. must denote the payment of the following duties * : that is, an

Inland bill of exchange, draft or order, for the payment to the bearer, or to order, either on demand or otherwise, of any sum of money

| | Not exceeding 2 months after date, or 60 days after sight. | | | If exceeding 2 months after date, or 60 days after sight. | | |
|---|---|----|----|--|----|----|
| | £ | s. | d. | £ | s. | d. |
| Amounting to 40s. and not exceeding 5l. 5s. | 0 | 1 | 0 | 0 | 1 | 6 |
| Exceeding 5l. 5s. and not exceeding 20l. | 0 | 1 | 6 | 0 | 2 | 0 |
| Exceeding 20l. and not exceeding 30l. | 0 | 2 | 0 | 0 | 2 | 6 |
| Exceeding 30l. and not exceeding 50l. | 0 | 2 | 6 | 0 | 3 | 6 |
| Exceeding 50l. and not exceeding 100l. | 0 | 3 | 6 | 0 | 4 | 6 |
| Exceeding 100l. and not exceeding 200l. | 0 | 4 | 6 | 0 | 5 | 0 |
| Exceeding 200l. and not exceeding 300l. | 0 | 5 | 0 | 0 | 6 | 0 |
| Exceeding 300l. and not exceeding 500l. | 0 | 6 | 0 | 0 | 8 | 6 |

respectively, or otherwise specified and set forth in the same schedule ; and that the said schedule, and all the provisions, regulations and directions therein contained, with respect to the said duties, and the instruments, matters, and things charged therewith, shall be deemed and taken to be part of that act, and shall be read and construed as if the same had been inserted therein at this place, and shall be applied, observed, and put in execution accordingly.

* See note * in the following page.

| | Not exceeding 2 months after date, or 60 days after sight. | | | If exceeding 2 months after date, or 60 days after sight. | | |
|--|---|----|----|--|----|----|
| | £ | s. | d. | £ | s. | d. |
| Exceeding 500 <i>l.</i> and not ex- ceeding 1000 <i>l.</i> | 0 | 8 | 6 | 0 | 12 | 6 |
| Exceeding 1000 <i>l.</i> and not ex- ceeding 2000 <i>l.</i> | 0 | 12 | 6 | 0 | 15 | 0 |
| Exceeding 2000 <i>l.</i> and not ex- ceeding 3000 <i>l.</i> | 0 | 15 | 0 | 1 | 5 | 0 |
| Exceeding 3000 <i>l.</i> | 1 | 5 | 0 | 1 | 10 | 0 |

* *The Schedule, as far as it relates to bills or notes, is inserted in the text, except the exemptions, which are as follow:*

1. *As to Bills* — “Exemptions from the preceding and all other stamp duties:

“All bills of exchange, or bank-post bills issued by the Governor and Company of the Bank of England.

“All bills, orders, remittance bills, and remittance certificates drawn by commissioned officers, masters and surgeons in the navy, or by any commissioner or commissioners of the navy, under the authority of 35 Geo. 3. c. 94.

“All bills drawn pursuant to any former act or acts of parliament, by the commissioners of the navy, or by the commissioners for victualling the navy, or by the commissioners for managing the transport service, and for taking care of sick and wounded seamen, upon and payable by the treasurer of the navy.

“All drafts or orders for the payment of any sum of money to the bearer on demand, and drawn upon any banker or bankers, or any person or persons acting as a banker, who shall reside, or transact the business of a banker, within ten * miles of the place where such drafts or orders shall be issued; provided such place shall be specified in such drafts or orders; and provided the same shall bear date on or before

(* The distance is, by 9 G. 4. c. 49. enlarged to fifteen miles.)

| | | |
|---|---|--|
| <p>Inland bill, draft or order, for the payment of any sum of mo- ney, though not made payable to the bearer or to order, if the same shall be delivered to the payee, or some person on his or her behalf,</p> | } | <p>The same duty as on a bill of exchange for the like sum payable to bearer or or- der.</p> |
|---|---|--|

“ the day on which the same shall be issued ; and provided the
“ same do not direct the payment to be made by bills or pro-
“ missory notes.

“ All bills for the pay and allowances of his Majesty's land
“ forces, or for other expenditures liable to be charged in the
“ public regimental or district accounts, which shall be drawn
“ according to the forms now prescribed or hereafter to be pre-
“ scribed by his Majesty's orders, by the pay-masters of regi-
“ ments or corps, or by the chief pay-master or deputy pay-
“ master and accountant of the army depôt, or by the pay-
“ masters of recruiting districts, or by the pay-masters of
“ detachments, or by the officer or officers authorised to per-
“ form the duties of the pay-mastership during a vacancy, or
“ the absence, suspension, or incapacity of any such pay-master
“ as aforesaid, *save and except such bills as shall be drawn in*
“ *favour of contractors or others, who furnish bread or forage to*
“ *his Majesty's troops, and who, by their contracts or agreements*
“ *shall be liable to pay the stamp duties on the bills given in pay-*
“ *ment for the articles supplied by them.*”

As to Notes — “ Exemptions from the duties on promissory
“ notes :

“ All notes promising the payment of any sum or sums of
“ money, out of any particular fund which may or may not be
“ available ; or upon any condition or contingency, which may
“ or may not be performed or happen, where the same shall
“ not be made payable to the bearer or to order ; and also
“ where the same shall be made payable to the bearer or to
“ order, if the same shall amount to 20*l.* or be indefinite.

| | | |
|--|---|---|
| <p>Inland bill draft or order, for the payment of any sum of money, weekly, monthly, or at any other stated periods, if made payable to the bearer or to order, or if delivered to the payee, or some person on his or her behalf; where the total amount of the money thereby made payable shall be specified therein, or can be ascertained therefrom,</p> | } | <p>The same duty as on a bill payable to bearer or order on demand, for a sum equal to such total amount.</p> |
|--|---|---|

| | | |
|--|---|---|
| <p>And where the total amount of the money thereby made payable shall be indefinite,</p> | } | <p>The same duty as on a bill on demand for the sum therein expressed only.</p> |
|--|---|---|

And the following instruments shall be deemed and taken to be inland bills, drafts or orders, for the payment of money, within the intent and meaning of this schedule, viz.

All drafts or orders for the payment of any sum

“ And all other instruments bearing in any degree the form or style of promissory notes, but which in law shall be deemed special agreements, except those hereby expressly directed to be deemed promissory notes.

“ *But such of the notes and instruments here exempted from the duty on promissory notes, shall nevertheless be liable to the duty which may attach thereon, as agreements or otherwise.*

“ Exemption from the preceding and all other stamp duties :
 “ All promissory notes for the payment of money issued by
 “ the Governor and Company of the Bank of England.”

of money, by a bill or promissory note, or for the delivery of any such bill or note in payment or satisfaction of any sum of money, where such drafts or orders shall require the payment or delivery to be made to the bearer or to order, or shall be delivered to the payee, or some person on his or her behalf.

All receipts given by any banker or bankers, or other person, or persons for money received, which shall entitle, or be intended to entitle, the person or persons paying the money, or the bearer of such receipts, to receive the like sum from any third person or persons.

And all bills, drafts or orders for the payment of any sum of money out of any particular fund, which may or may not be available, or upon any condition or contingency, which may or may not be performed or happen; if the same shall be made payable to the bearer or to order, or if the same shall be delivered to the payee, or some person on his or her behalf.

A foreign bill of exchange, (or bill of exchange drawn in, but payable out of, Great Britain), if drawn singly and not in a set, the same duty as on an inland bill of the same amount and tenor.

Foreign bills of exchange, drawn in sets according to the custom of merchants: for every bill of each set,

s. d.

Where the sum made payable thereby

shall not exceed 100*l.* 1 6

| | <i>s.</i> | <i>d.</i> |
|--|-----------|-----------|
| And where it shall exceed 100 <i>l.</i> and not exceed 200 <i>l.</i> | 3 | 0 |
| And where it shall exceed 200 <i>l.</i> and not exceed 500 <i>l.</i> | 4 | 0 |
| And where it shall exceed 500 <i>l.</i> and not exceed 1000 <i>l.</i> | 5 | 0 |
| And where it shall exceed 1000 <i>l.</i> and not exceed 2000 <i>l.</i> | 7 | 6 |
| And where it shall exceed 2000 <i>l.</i> and not exceed 3000 <i>l.</i> | 10 | 0 |
| And where it shall exceed 3000 <i>l.</i> | 15 | 0 |

Promissory note for the payment to *the bearer on demand*, of any sum of money,

| | <i>£</i> | <i>s.</i> | <i>d.</i> |
|---|----------|-----------|-----------|
| Not exceeding 1 <i>l.</i> 1 <i>s.</i> | 0 | 0 | 5 |
| Exceeding 1 <i>l.</i> 1 <i>s.</i> and not exceeding 2 <i>l.</i> 2 <i>s.</i> | 0 | 0 | 10 |
| Exceeding 2 <i>l.</i> 2 <i>s.</i> and not exceeding 5 <i>l.</i> 5 <i>s.</i> | 0 | 1 | 3 |
| Exceeding 5 <i>l.</i> 5 <i>s.</i> and not exceeding 10 <i>l.</i> | 0 | 1 | 9 |
| Exceeding 10 <i>l.</i> and not exceeding 20 <i>l.</i> | 0 | 2 | 0 |
| Exceeding 20 <i>l.</i> and not exceeding 30 <i>l.</i> | 0 | 3 | 0 |
| Exceeding 30 <i>l.</i> and not exceeding 50 <i>l.</i> | 0 | 5 | 0 |
| Exceeding 50 <i>l.</i> and not exceeding 100 <i>l.</i> | 0 | 8 | 6 |

Which said notes may be re-issued, after payment thereof, as often as shall be thought fit.

Promissory note for the payment, *in any other manner than to the bearer on demand*, of any sum of money

| | Not exceeding 2 months after date, or 60 days after sight. | | | If exceeding 2 months after date, or 60 days after sight, payable to bearer or other- wise. | | |
|---|---|----|----|--|----|----|
| | £ | s. | d. | £ | s. | d. |
| Amounting to 40s. and not exceeding 5 <i>l.</i> 5 <i>s.</i> | 0 | 1 | 0 | 0 | 1 | 6 |
| Exceeding 5 <i>l.</i> 5 <i>s.</i> and not exceeding 20 <i>l.</i> | 0 | 1 | 6 | 0 | 2 | 0 |
| Exceeding 20 <i>l.</i> and not ex- ceeding 30 <i>l.</i> | 0 | 2 | 0 | 0 | 2 | 6 |
| Exceeding 30 <i>l.</i> and not ex- ceeding 50 <i>l.</i> | 0 | 2 | 6 | 0 | 3 | 6 |
| Exceeding 50 <i>l.</i> and not ex- ceeding 100 <i>l.</i> | 0 | 3 | 6 | 0 | 4 | 6 |

These notes are not to be re-issued after being once paid.

Promissory note for the payment of any sum of money, *either to the bearer on demand ; or in any other manner than to the bearer on demand*,

| | Not exceeding 2 months after date, or 60 days after sight. | | | If exceeding 2 months after date, or 60 days after sight. | | |
|--|---|----|----|--|----|----|
| | £ | s. | d. | £ | s. | d. |
| Exceeding 100 <i>l.</i> and not exceeding 200 <i>l.</i> | 0 | 4 | 6 | 0 | 5 | 0 |
| Exceeding 200 <i>l.</i> and not exceeding 300 <i>l.</i> | 0 | 5 | 0 | 0 | 6 | 0 |

| | Not exceeding 2 months after date, or 60 days after sight. | | | If exceeding 2 months after date, or 60 days after sight. | | |
|--|---|----|----|--|----|----|
| | £. | s. | d. | £. | s. | d. |
| Exceeding 300 <i>l.</i> and not exceeding 500 <i>l.</i> . . . | 0 | 6 | 0 | 0 | 8 | 6 |
| Exceeding 500 <i>l.</i> and not exceeding 1000 <i>l.</i> . . . | 0 | 8 | 6 | 0 | 12 | 6 |
| Exceeding 1000 <i>l.</i> and not exceeding 2000 <i>l.</i> . . . | 0 | 12 | 6 | 0 | 15 | 0 |
| Exceeding 2000 <i>l.</i> and not exceeding 3000 <i>l.</i> . . . | 0 | 15 | 0 | 1 | 5 | 0 |
| Exceeding 3000 <i>l.</i> . . . | 1 | 5 | 0 | 1 | 10 | 0 |

These notes are not to be re-issued after being once paid.

Promissory note for the payment of any sum of money by instalments, or for the payment of several sums of money at different days or times, so that the whole of the money to be paid shall be definite and certain, } The same duty as on a promissory note, payable in less than 2 months after date, for a sum equal to the whole amount of the money to be paid.

And the following instruments shall be deemed and taken to be promissory notes, within the intent and meaning of this schedule: viz.

All notes promising the payment of any sum or sums of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer, or to order, and if the

same shall be definite and certain, and not amount in the whole to 20*l.*: where they are not made payable to the bearer, or to order, or where the sum is indefinite, or amounts to 20*l.*, they are exempt from note duties, but liable to such duties as may attach thereon as agreements or otherwise.

And all receipts for money deposited in any bank, or in the hands of any banker or bankers, which shall contain any agreement or memorandum importing that interest shall be paid for the money so deposited.

All other instruments bearing in any degree the form or style of promissory notes, but which in law shall be deemed special agreements, except those expressly directed to be deemed promissory notes, shall be exempt from the duties on notes, but liable to the duties which may attach thereon as agreements or otherwise.

Sect. 9.—Reserving interest from the date of a bill or note will not vary the stamp; the stamp is to be according to the sum due at the time that the bill or note is given. (20)

(20) *Pruessing v. Ing*, 4 Barn. & Ald. 204. In an action on a note at three months, for 30*l.*, with interest from the date thereof, objection was taken at the trial that it was only upon a stamp applicable to notes for a sum not exceeding 30*l.*: whereas this, being for 30*l.* and interest, was, in substance, a note for

Sect. 10.—A note payable two months after sight requires the same stamp as a bill exceeding sixty days after sight, if those two months, exclusive of the days of grace, exceed sixty days after sight. (21)

A bill payable at sight is not to be considered as a bill payable on demand. (22)

A note payable to order on demand is within the description in 55 G. 3. c. 184. schedule, part 1. of a note “payable otherwise than to the bearer on

30*l.* 7*s.* 6*d.* But on motion for nonsuit, the Court were of opinion that the stamp was to be regulated by the sum due at the time the note was given, the principal without interest: rule refused.

(21) *Sturdy v. Henderson*, 4 Barn. & Ald. 512. Action on note for 400*l.*, dated 7th July, 1818, payable two months after sight: nonsuit, because it had not a stamp required for a note payable at more than sixty days after sight: motion for new trial, on the ground that it was, in substance, at two months after date; for that the drawing it was having sight thereof, and it would be payable without the maker's having further sight thereof. But it being suggested that bank-post bills at seven days' sight, which are really notes, do not become payable till after they have been presented for acceptance, and a further term of seven days and days of grace have elapsed, the Court thought this note would require a new presentment for sight, and was therefore properly a note after sight, not after date; and rule refused.

(22) *J. Anson v. Thomas*, B. R. Trin. 24 G. 3. In an action on an inland bill, the question was, whether it was included under an exception in the Stamp Act of 23 G. 3. c. 49. s. 4. in favour of bills payable *on demand*, and the Court held it was not, and Buller J. mentioned a case before Willes C. J. in London, in which a jury of merchants was of opinion that the usual days of grace were to be allowed on bills payable at sight.

demand, *not exceeding two months after date, or sixty days after sight.*" (23)

And *qu.* whether *Keates v. Whieldon* (8 Barn. & Cr. 7.) was rightly decided.

Sect. 11.—Making and issuing a bill or note before the day on which it bears date, so that it shall not in fact become payable within two months, or within sixty days after sight next after the day on which it was issued, subjects to a penalty of 100*l.*, unless the bill or note bear the higher stamp. (24)

(23) *Moyser v. Whitaker*, 9 Barn. & Cr. 409. In an action by the executors of the payee against the maker, upon a note for 100*l.* with interest, payable to the payee or order on demand, it was objected that the stamp (3*s.* 6*d.*) was wrong: that is the stamp for notes payable in any other manner than to the bearer on demand, but not exceeding two months after date, or sixty days after sight; and it was urged that it could not be said at the time this note was given that it would not exceed two months from the date before it would be payable: but the Court answered, that it could not be said when it was given that it would exceed the two months, &c., and the higher rate of duty was confined to those notes which necessarily exceeded the two months. The rate of duty was to be fixed at the time of giving the note, and the subject could not then be charged beyond what would then be the lowest rate. The payee might demand the money as soon as the note was given.

(24) By 55 G. 3. c. 184. s. 12. it is enacted, "That if any person or persons shall make and issue, or cause to be made and issued, any bill of exchange, draft, or order, or promissory note, for the payment of money at any time after date or sight, which shall bear date subsequent to the day on which it shall be issued, so that it shall not in fact become payable in two

But no objection can be taken on that ground to such bill or note in the hands of an innocent indorsee. (25)

Sect. 12.— Provided a bill or note bear a stamp of the proper denomination, it is now (26) no

months (if made payable after date), or in sixty days (if made payable after sight) next after the day on which it shall be issued, unless the same shall be stamped for denoting the duty thereby imposed on a bill of exchange and promissory note for the payment of money at any time exceeding two months after date or sixty days after sight; he, she, or they shall, for every such bill, draft, order or note, forfeit the sum of one hundred pounds."

(25) *Upstone v. Marchant*, 2 Barn. & Cr. 10. Indorsee against acceptor on bill dated 31st December, for 21*l.* 9*s.* at two months after date, on a 2*s.* stamp: it was proved that the bill was at first dated 21st December, and accepted that day, but that in a few minutes the drawer, at the acceptor's request, altered the date to the 31st, and it was thereupon urged that the stamp should have been 2*s.* 6*d.* Abbott C. J. over-ruled the objection, and on motion for new trial, the Court held that "date," in the stamp act, denoted the period expressed on the face of the bill, and the rule was therefore refused.

(26) By 43 G. 3. c. 127. s. 6. it is enacted, "That every instrument, matter or thing, although stamped or impressed with any stamp of greater value than the stamp required by law, shall be valid and effectual; provided such stamp shall be of the denomination required by law for such instrument, matter or thing, any statute, law or usage to the contrary notwithstanding."

See the cases of *Farr v. Price*, 1 East. Rep. 55., and *Taylor v. Hague*, 2 East. Rep. 414., in which stamps were objected to on the ground which this act has now removed; see also *Chamberlain v. Porter*, 1 New Rep. 30.

Manning v. Livie, before Lord Kenyon, sittings after Michaelmas term, 1796. In an action on a note by an indorsee,

ground of objection to it, that it is of greater value than that required by law : nor is it, since 55 G. 3., though it have a stamp of a different denomination, unless such stamp be specially appropriated to some other instrument, by having its name on the face thereof. (27)

And where a bill or note is upon a stamp so specially appropriated, it may, perhaps, be stamped under 37 G. 3. c. 136. s. 5. on payment of the duty and 40s. penalty before it has become payable, or on payment of the duty and 10*l.* afterwards. (28)

the stamp appeared to be a 7*s.* deed stamp ; and Lord Kenyon said the note could not be read, and the plaintiff was accordingly nonsuited.

(27) By 55 G. 3. c. 184. s. 10. it is enacted, " That from and after the passing of this act, all instruments for or upon which any stamp or stamps shall have been used of an improper denomination or rate of duty, but of equal or greater value in the whole with or than the stamp or stamps which ought regularly to have been used thereon, shall, nevertheless, be deemed valid and effectual in the law ; except in cases where the stamp or stamps used on such instruments shall have been specially appropriated to any other instrument by having its name on the face thereof."

(28) By 37 Geo. 3. c. 136. s. 5. (incorporated with 48 Geo. 3. c. 149. by ss. 3. and 8. of that act) after reciting that part of 31 Geo. 3. c. 25. s. 19. which declares that it shall not be lawful for the commissioners to stamp any vellum, &c. after any bill, &c. is written thereon, it is enacted, " That it shall and may be lawful for any person or persons who shall be the holder or holders of any bill of exchange, promissory note, or other note, draft or order, made after the passing of that act, and liable to any stamp duty by virtue of the said recited act, which shall be stamped with a stamp of a different denomination than is

Sect. 13.—The paper, &c. on which a bill or note is written (though it might formerly have been stamped at any time, on paying a penalty,) ought not *now*, except in the case above mentioned, to be stamped after it is issued; but if it be, the court will not, at least against a person who took it after it had been rightly stamped, and who might

required by the said act, if the same shall be of equal or superior value to the stamp required, to produce the same, or cause the same to be produced, within the respective times thereafter mentioned, to the commissioners appointed to manage the said duties, at the head office of stamps in Middelsex, or to such officer or officers as the said commissioners, or the major part of them, shall, by writing under their hands, appoint for such purpose; and it shall and may be lawful for such commissioners to direct the proper officer or officers, and such officer or officers is and are hereby required, upon payment of the duty payable on such vellum, parchment or paper, by the said recited act, and such penalty as is thereafter mentioned, over and above the said duty, to mark or stamp such bill of exchange, promissory note, or other note, draft or order, with the proper mark or stamp, and to give a receipt for the duty and penalty so paid, on the back of such bill of exchange, promissory note or other note, draft or order so stamped; and every such bill of exchange, promissory note or other note, draft or order, so stamped, shall have, and be deemed of, the like force and validity in the law, as if the same had been duly stamped according to the directions of the said recited act; and all and every person or persons procuring such bill of exchange, promissory note, or other note, draft or order, to be stamped as directed by this act, shall be, and is and are, hereby indemnified, freed and discharged, from and against all penalties and forfeitures incurred by reason of such bill of exchange, promissory note, or other note, draft or order, not having been duly stamped according to the directions of the said act."

And by s. 6. it is enacted, "That if any such bill of exchange,

not have known but that it was duly stamped when it was issued, allow evidence to prove the time of stamping it. (29)

But if a note before 55 G. 3. c. 184. were issued with a wrong stamp, and of insufficient value, the stamping it afterwards with a stamp of wrong denomination and of greater value, and paying a penalty, will not make it available. (30)

promissory note, or other note, draft or order, shall be produced to the said commissioners before the same shall be payable according to the tenor and effect thereof, the same shall be stamped, on payment of the said duty, and the penalty of 40s.; but in case such bill of exchange, promissory note or other note, draft or order, shall be payable, according to the tenor and effect thereof, before the production thereof to the said commissioners, for the purpose before mentioned, then the same shall not be stamped, unless on payment of the duty, and the sum of 10*l.* for the said penalty."

(29) *Wright v. Riley, Peake*, 173. In an action by the indorsee of a bill dated 9th September, 1791, the bill when produced appeared to be properly stamped, but the defendant proved that it was not stamped until some time after it was drawn; Lord Kenyon however held, "That though the commissioners might have exceeded their authority in stamping it against the positive directions of the act, it became a valid instrument when stamped, and a judge at *nisi prius* could not enquire how and at what time it was stamped; that great inconvenience might arise, and a great check might be put upon paper credit, if the objection were allowed, because it would be impossible for a man taking a bill in the ordinary course of business, if it was not unstamped when he took it, to know whether it was stamped before it was issued." The plaintiff had a verdict.

(30) *Green v. Davies*, 4 Barn. & Cr. 235. A note of 2d December, 1814, for 100*l.* was upon a three-penny receipt stamp. In an action upon it, it appeared to have also a 1*l.* agreement

Sect. 14. — Notes payable to the bearer on demand for any sum not exceeding 100*l.*, duly stamped according to 55 G. 3. c. 184. (31), may be re-issued after payment, as often as may be thought fit, without a new stamp; so as such issuing is by the same persons by whom they were originally issued, or some or one of them; or, if they were originally issued by partners, by some one or more of the original partners, either alone, or jointly with some one or more additional partners; and if such notes were at first made payable elsewhere than where they were drawn, an alteration as to the house or place of payment will be immaterial. (32)

stamp, and there was a receipt indorsed for the 1*l.*, and a 5*l.* penalty for stamping it: upon point saved, and rule nisi for non-suit, the Court was clear the objection in respect of the stamp was unanswerable, and the rule was made absolute.

(31) By 55 G. 3. c. 184. s. 14., it is enacted, "That from and after the 31st day of August, 1815, it shall be lawful for any banker or bankers, or other person or persons, who shall have made and issued any promissory notes for payment to the bearer on demand, of any sum of money not exceeding 100*l.* each, duly stamped according to the directions of this act, to re-issue the same from time to time after payment thereof, as often as he, she, or they shall think fit, without being liable to pay any further duty in respect thereof; and that all promissory notes so to be re-issued as aforesaid shall be good and valid, and as available in the law to all intents and purposes as they were upon the first issuing thereof."

(32) By 55 G. 3. c. 184. s. 15., "No promissory note for the payment to the bearer on demand, of any sum of money not exceeding 100*l.*, which shall have been made and issued by any bankers or other persons in partnership, and for which

But no persons are at liberty to issue such re-issuable notes, unless they take out a licence yearly for that purpose. (33)

the proper stamp duty shall have been once paid according to the provisions of this act, shall be deemed liable to the payment of any further duty, although the same shall be re-issued by, and as the note of, some only of the persons who originally made and issued the same, or by, and as the note of, any one or more of the persons who originally made and issued the same, and any other person or persons in partnership with him or them jointly; nor although such note (if made payable at any other than the place where drawn) shall be re-issued with any alteration therein, only of the house or place at which the same shall have been at first made payable."

(33) By 55 G.S. c. 184. s. 24., It shall not be lawful for any banker or bankers, or other person or persons (except the governor and company of the Bank of England), to issue any promissory notes for money payable to the bearer on demand, hereby charged with a duty and allowed to be re-issued, without taking out a licence yearly for that purpose; which licence shall be granted by two or more commissioners of stamps for the time being, or by some persons authorised in that behalf by the said commissioners, or the major part of them, on payment of the duty charged thereon in the schedule hereunto annexed; and a separate and distinct licence shall be taken out, for or in respect of every town or place where any such promissory notes shall be issued by, or by any agent or agents for or on account of, any banker or bankers, or other person or persons; and every such licence shall specify the proper name or names and place or places of abode of the person or persons, or the proper name and description of any body corporate to whom the same shall be granted, and also the name of the town or place where, and the name of the bank, as well as the partnership or other name, style, or firm, under which, such notes are to be issued; and where any such licence shall be granted to persons in partnership, the same shall specify and set forth the names and places of abode of all the persons concerned in

And where they issue notes in several towns or places, they must in general have a distinct licence for each town or place. (34)

Except that houses which had established branch banks or agents elsewhere than where they had their chief establishment before 10th October, 1808, may include the places where such branch banks or agents were established in the licence for the place where they have their chief establishment; and that houses in Scotland who issue notes in more than four towns or places need only take out four distinct licences. (35)

the partnership, whether all their names shall appear on the promissory notes to be issued by them, or not; and in default thereof, such licence shall be absolutely void; and every such licence which shall be granted between the 10th day of October and the 11th day of November in any year, shall be dated on the 11th day of October; and every such licence, which shall be granted at any other time, shall be dated on the day on which the same shall be granted; and every such licence respectively shall have effect and continue in force from the day of the date thereof until the 10th day of October following, both inclusive. Vide *Whitlock v. Underwood*, post.

(34) By 55 G.3. c.184. s.26., "Where any banker or bankers, person or persons, applying for a licence under this act, would, under the act of the forty-eighth year of his Majesty's reign, have been entitled to have two or more towns or places in England included in one licence if this act had not been made, such banker or bankers, person or persons, shall have and be entitled to the like privilege under this act."

(35) By 55 G.3. c.184. s.25., "No banker or bankers, person or persons, shall be obliged to take out more than four licences in all for any number of towns or places in Scotland; and in case any banker or bankers, person or persons, shall

And the issuing re-issuable notes without a licence for the purpose subjects to a penalty of 100*l.* (36)

And the re-issuing notes or bills which ought not to be re-issued subjects the person re-issuing them to a penalty of 50*l.* and the duty ; and any person knowingly taking them, to a penalty of 20*l.* (37)

issue such promissory notes as aforesaid, by themselves or their agents, at more than four different towns or places in Scotland, then, after taking out three distinct licences for three such towns or places, such banker or bankers, person or persons, shall be entitled to have all the rest of such towns or places included in a fourth licence."

(36) By 55 G. 3. c. 184. s. 27., " If any banker or bankers, or other person or persons (except the governor and company of the Bank of England), shall issue or cause to be issued by any agent, any promissory note for money payable to the bearer on demand, hereby charged with a duty and allowed to be re-issued as aforesaid, without being licensed so to do in the manner aforesaid, or at any other town or place, or under any other name, style, or firm than shall be specified in his or their licence, the banker or bankers, or other person or persons so offending, shall, for every such offence, forfeit the sum of 100*l.*"

(37) By 55 G. 3. c. 184. s. 19., " All promissory notes hereby allowed to continue re-issuable for a limited period, but not afterwards, shall, upon the payment thereof at any time after the expiration of such period ; and all promissory notes, bills of exchange, drafts or orders for money, not hereby allowed to be re-issued, shall upon any payment thereof, be deemed and taken respectively to be thereupon wholly discharged, vacated, and satisfied, and shall be no longer negotiable or available in any manner whatsoever, but shall be forthwith cancelled by the person or persons paying the same : and if any person or persons shall re-issue, or cause or permit to be re-issued, any promissory note hereby allowed to be re-issued for a limited period as aforesaid, at any time after the expiration of the term

A licence for a partnership will continue in force for issuing notes under the same firm till the 10th of October inclusive, after its date, notwithstanding an alteration in the partnership. (38)

or period allowed for that purpose ; or if any person or persons shall re-issue, or cause or permit to be re-issued, any promissory note, bill of exchange, draft or order for money, not hereby allowed to be re-issued, at any time after the payment thereof ; or if any person or persons paying or causing to be paid any such note, bill, draft or order, as aforesaid, shall refuse or neglect to cancel the same according to the directions of this act, then, and in either of those cases, the person or persons so offending shall for every such note, bill, draft or order as aforesaid, forfeit the sum of 50*l.* ; and in case of any such note, bill, draft, or order being re-issued contrary to the intent and meaning of this act, the person or persons re-issuing the same, or causing or permitting the same to be re-issued, shall also be answerable and accountable to his Majesty, his heirs and successors, for a further duty in respect of every such note, bill, draft or order, of such and the same amount as would have been chargeable thereon in case the same had been then issued for the first time, and so from time to time as often as the same shall be so re-issued ; which further duty shall and may be sued for and recovered accordingly, as a debt to his Majesty, his heirs and successors ; and if any person or persons shall receive or take any such note, bill, draft or order, in payment of or as a security for the sum therein expressed, knowing the same to be re-issued contrary to the intent and meaning of this act, he, she, or they shall, for every such note, bill, draft or order, forfeit the sum of 20*l.*"

(38) By 55 G. 3. c. 184. s. 28., " Where any such licence as aforesaid shall be granted to any persons in partnership, the same shall continue in force for the issuing of promissory notes duly stamped, under the name, style or firm therein specified, until the tenth day of October inclusive, following the date thereof, notwithstanding any alteration in the partnership."

Re-issuable notes must not have the date printed thereon under a penalty of 50*l.* (39)

Notes for any sum not exceeding 100*l.* payable to the bearer on demand (which are re-issuable), though not intended to be re-issued, must have the same stamp as if they were meant to be re-issued. (40)

Notes payable to the bearer generally, without specifying any time for payment, are payable on demand.

(39) By 55 G.3. c.184. s.18., "It shall not be lawful for any banker or bankers, or other person or persons, to issue any promissory note for the payment of money to the bearer on demand, liable to any of the duties imposed by this act, with the date printed therein; and if any banker or bankers, or other person or persons, shall issue or cause to be issued any such promissory note with the date printed therein, he or they shall for every such promissory note so issued forfeit the sum of 50*l.*"

(40) *Whitlock v. Underwood*, 1 Barn. & Cr. 157. A note was as follows: "13th December, 1821. I promise to pay Wm. Whitlock or bearer 40*l.* value received with interest." It was on a 2*s.* 6*d.* stamp; and on the ground that it should have been upon a 5*s.* stamp, nonsuit. A rule nisi was obtained for a new trial on the ground that, as this was not intended to be re-issued, it did not require a higher stamp than a note for the same amount payable within two months after date; and it was urged that upon a bill payable to the bearer on demand for the same amount the stamp in question would have been sufficient: but on cause shown, the Court was clear, that upon all notes payable to bearer on demand for sums not exceeding 100*l.* the stamps specified in the schedule for notes payable to bearer on demand must be used, without any distinction between notes intended to be re-issued and notes not so intended; that it would create confusion to make this distinction; and they intimated that, under 55 G.3. c.184. s.24., none but licensed persons could issue such notes.

C A P. IV.

SECT. 1. *Of the Alteration of Bills or Notes.*

2. *At what Time,* p. 115.

3. *Onus of Proof in Case of Alteration,* p. 117.

IF a bill or note be altered in a material part (though by consent of all parties), after it has once issued, it requires (1) a new stamp ;

Unless such alteration were to correct a mistake, and merely to make the bill what it was originally intended to have been, for in such case a new stamp is not necessary. (2)

(1) *Wilson v. Justice*, 1796. A bill of nine months after date was, by consent of all parties, a fortnight after it had been delivered to the payee, altered to ten months after date. Lord Kenyon held a new stamp necessary, and nonsuited the plaintiff.

Bowman v. Nicoll, 5 Term Rep. 597. A bill dated 2d September, and payable twenty-one days after date, was, by consent of the acceptor, altered to fifty-one days after date: on 30th September it was with the like consent, and whilst it remained in the drawer's hands, restored to twenty-one days, but the date was altered to September 14th. Lord Kenyon nonsuited, and the Court held the nonsuit right.

(2) *Kershaw v. Cox*, 3 Esp. N. P. C. 246. In an action on a bill, it appeared that the defendant, who was the payee, had *indorsed* the bill to one K., by whom it was passed to the plaintiffs ; that they, on discovering that the words, " or order," had been omitted, returned it the day after it was drawn, and the drawer, with the consent of the defendant, then inserted those words. Le Blanc J. held that no new stamp was necessary ; that this was not new a instrument, as in *Bowman v. Nicoll*, but merely a correction of a mistake, and in furtherance of the original

Correcting the date, to make it what it was intended, will not affect a bill or note. (3)

Where an alteration will vacate a bill or note, it will have that effect, though it were made by a mere stranger. (4)

intention of the parties; and the plaintiffs had a verdict. A new trial was afterwards moved for, but the Court refused a rule. See 10 East. Rep. 437.

Jacob v. Hart, 6 M. & S. 142. Indorsee against acceptor: Defendant, when he accepted the bill, noticed that by mistake the date was March instead of April. The payee, upon communication with the drawer, altered the date to April, and the defendant subsequently approved of the alteration. Before the bill was negotiated, defendant, at the request of the drawer, wrote upon it, "payable at Mr. J.'s, St. Mary Axe, London." It was objected at the trial that these alterations made a new stamp necessary; but, Lord Ellenborough held the contrary; and on rule nisi for new trial, the Court were of opinion he did right. Rule refused.

M'Intosh v. Haydon, 1 Ryan & Moody, 362. In an action by indorsee against acceptor, it appeared that defendant's acceptance was general, but that the holder added, "payable at Messrs. Ransom and Co.'s, bankers, London:" defendant was not privy to this addition, plaintiff was. In an action against defendant, he insisted that this alteration vacated his acceptance; and Lord T. held it did; because it altered the character of the bill, and would induce a holder to think Ransom and Co.'s the proper place to present it, not defendant's. The acceptance was after 1 & 2 G. 4. c. 78.

(3) *Jacob v. Hart*, *suprà*.

(4) *Master v. Miller*, 4 Term Rep. 320. 2 H. Bl. 141. In an action by indorsees against the acceptor of a bill, payable three months after date, to Wilkinson and Cooke, the declaration had one count upon the bill as dated the 20th March, and another as dated the 26th March. The jury found a special verdict, stating that the bill was drawn and dated the 26th March; that it was accepted; and that afterwards, and whilst it re-

An alteration of a bill or note in a material part not only makes a new stamp necessary, but vacates the bill or note (independently of the stamp laws), except as between the parties consenting to such alteration.

Altering the (5) date, or sum, or (5) time for

mained in the hands of Wilkinson and Cooke, the date was altered from the 26th to the 20th March, without the defendant's knowledge, and by some person unknown to the jury. That after such alteration it was indorsed for a valuable consideration by Wilkinson and Cooke to the plaintiffs. After two arguments, Lord Kenyon, Ashhurst, and Grose, Js. held, that the alteration, though by a stranger, vacated the bill: Buller J. differed; but on error, the whole court was so clear that it was vacated that they would not hear a second argument, and judgment for the defendant was affirmed. See *Henfrec v. Bromley*, 6 East. Rep. 309.

(5) *Walton v. Hastings*, 4 Campb. 223. 1 Stark. 215. A bill drawn by Brooks in favour of plaintiff was dated 5th July. An agent of plaintiff's presented it for acceptance, and defendant, the drawee, desired to have the date altered to the 10th, which was done accordingly, and then defendant accepted it. Lord Ellenborough held that as the bill was issued before this alteration was made, and was a perfect, available instrument, the alteration made a new stamp necessary, and nonsuit.

Outhwaite v. Luntley, 4 Campb. 179. A bill drawn 5th March was indorsed to J. S., who left it for acceptance. The drawees altered the date to 15th March, and then accepted it. In an action on the bill by indorsee against indorser, it was argued that this alteration vacated the bill. Lord Ellenborough was of that opinion, because the bill was a perfect instrument when issued to the indorsee, the alteration might embarrass parties who would expect notice or payment according to the original date, and the alteration made it a new bill, and made a new stamp necessary.

See *Wilson v. Justice*, and *Bowman v. Nicoll*, *antè*, p. 110. and *Cardwell v. Martin*, *infra*, p. 116. As to acceptances varying from the tenor of the bill, see Chapter VI.

payment; or inserting words, rendering a bill or note (6) negotiable, which was not so originally; or inserting words in a bill or note originally expressed to be for value received generally, stating such value to have been received on a (7) particular account; or adding as a maker or drawer (8) a person not originally intended to have been so, is a material alteration, and makes a new stamp necessary.

But inserting a mere memorandum to say where the bill or note is to be payable, if it give a right direction in that respect, is not. (9)

(6) See *Kershaw v. Cox*, *antè*, p. 110. n. (2). In *Knill v. Williams*, 10 East's Rep. 437., Le Blanc J. said, that *Kershaw v. Cox* could only be supported on the ground that the alteration was merely the correction of a mistake, for the alteration was a very material one.

(7) *Knill v. Williams*, 10 East. Rep. 431. Action on a note, by which, nine months after date, the defendant promised to pay to the plaintiff, or order, 100*l.* for value received, *for the good-will of the lease and trade of Mr. F. Knill, deceased*. It appeared at the trial before Le Blanc J., at Hereford, that the words in italics were added, by consent of both parties, on the day after the note had been signed and delivered to the plaintiff, without any new stamp being impressed upon it; upon this the plaintiff was nonsuited, and on a rule nisi to set aside the nonsuit, the whole Court held that the alteration was material, and therefore discharged the rule.

(8) See *Clark v. Blackstock*, *antè*.

(9) *Trapp v. Spearman*, 3 Esp. N. P. C. 57. In an action on a bill by an indorsee against the acceptor, the defence was, that the bill had been altered, by the insertion of the words, "When due, at the Cross Key's, Black Friars Road." But Lord Kenyon held that the alteration was immaterial, and the plaintiff had a verdict. See *Jacob v. Hart*, *antè*, p. 111.

So, correcting the address or style of the drawee, so as to make it accord with the acceptance, will not affect a bill. (10)

But altering an acceptance, so as to give an unwarranted place for payment, vacates the acceptance. (11)

Marson v. Petit, 1 Campb. N. P. C. 82. n. Indorsee against acceptor of a bill; after acceptance, the drawer, without the consent or knowledge of the defendant, wrote under his name, *Prescott and Co.* Lord Ellenborough held it immaterial.

(10) *Farquhar v. Southey*, 1 Moody and Malkin, 14. A bill was addressed to "Messrs. Southey, Crowther and Co.," they accepted it in the firm of "Southey and Crowther." The bill, when produced, appeared altered so as to make the address agree with the acceptance, "Messrs. Southey and Crowther:" whether the alteration was before or after the acceptance, did not appear. Littledale J. thought the alteration, whenever made, immaterial; and verdict for plaintiff.

(11) *Tidmarsh v. Grover*, 1 Maul. & Sel. 735. Defendant accepted a bill so as to make it payable at Bloxam and Co.'s; Bloxam and Co. failed, and the holder, without defendant's knowledge or consent, struck out their names, and substituted Esdaile and Co.'s. On point reserved whether this alteration vacated the acceptance, the whole Court held it did, and plaintiff was nonsuited.

Cowie v. Halsall, 4 Barnew. & Ald. 197. In an action by indorsee of a bill against the acceptor, it appeared that the acceptance was general, and that the drawer, without the defendant's knowledge, added to it "Payable at Mr. B.'s, Chiswell Street;" and on the ground that this was a material alteration, and vacated the acceptance, verdict for defendant. A motion was made for a new trial, but the Court thought the verdict right; for, this alteration would lead to a presentment at B.'s, not at defendant's, and the bill might be treated as dishonoured, and defendant be arrested thereon, without any presentment where he would expect it; and a rule was refused. *Macintosh v. Haydon*, *antè*, p. 111.

And altering the place where a bill or note is payable, if for a fraudulent purpose, may be a capital forgery. (12)

Sect. 2. — A bill or note is, *prima facie*, to be considered as issued as soon as it is passed away by the drawer or maker (13), or accepted by the drawee (14);

Not before. (15)

(12) *Rex v. Treble*, 2 Taunt. 328. Kellaway issued 10*l.* notes payable at Fordingbridge, or at Wilkinson and Co.'s London: these notes were re-issuable: several of them were paid in town, and stolen on their way back to Fordingbridge: Wilkinson and Co. failed, and the prisoner, who had got one of these notes, covered the names of Wilkinson and Co. with a small piece of paper containing the names of Ramsbottom and Co. and re-issued the note: he was indicted for forgery and convicted; and on argument before the twelve Judges, this was held a forgery; for, substituting a solvent house as one of the places of payment instead of an insolvent one, varied the credit of the note; and though Kellaway by the real note answered for no payment in London but at Wilkinson and Co.'s, this alteration made him answerable for it at Ramsbottom's.

(13) See *Walton v. Hastings*, *antè*, p. 112. *Outhwaite v. Luntly*, *antè*, p. 112. *Knill v. Williams*, *antè*, p. 113.

(14) See *Tidmarsh v. Grover*, and *Cowie v. Halsall*, *antè*, p. 115.

(15) *Kennerly v. Nash*, 1 Stark. 452. Maule drew a bill upon Nash at three months, payable to his (Maule's) order, and sent it to Nash for acceptance: Nash sent it back to Maule, and desired him to let the bill be at four months instead of three: Maule assented, and the bill was altered accordingly. On question whether this made a new stamp necessary, Lord Ellenborough held it did not, and the plaintiff had a verdict.

If two persons exchange acceptances, each bill is to be considered as issued as soon as the exchange is made, and any alteration afterwards will make new stamps necessary. (16)

But a bill is not to be considered as issued, so as to make a new stamp necessary, until it is in the hands of some one who is entitled to make a claim thereon; (17)

Though it be accepted and indorsed; (17)

And an alteration thereon without the knowledge of acceptor or indorser, though it will entitle them to consider their acceptance or indorsement vacated if they do not assent thereto, will be binding upon them if they assent. (17)

(16) *Cardwell v. Martin*, 9 East. Rep. 190. On the 3d of June, 1807, the defendant and Giles and Co. exchanged acceptances; on the 23d, before either of the bills had been passed away, they altered the dates to the 23d; the bills were payable at a certain period after date. Lord Ellenborough thought a new stamp necessary, and nonsuited the plaintiff, with liberty to move to set aside the nonsuit; on motion accordingly, the whole Court thought that the exchange of acceptances was a negotiation of each bill, and that the subsequent alteration rendered a new stamp necessary. Rule refused.

N. Each bill was payable to the drawer's order, and the plaintiff was a *bonâ fide* indorsee.

(17) *Downes v. Richardson*, B. R. Easter Term, 1822. Upon an issue from chancery, on the question whether Thompson, as acceptor of a bill of exchange, was indebted thereon to Downes, an indorsee; it appeared in evidence that the bill was drawn by Raines to his own order upon Thompson, accepted by Thompson and indorsed by Raines and Lachlan; that its date was the 6th March; that Raines, Thompson, and Lachlan were in the habit of putting their names for each other upon bills, and that

Sect. 3. — If a bill or note appear upon the face of it to have been altered, it is for the holder to prove that it was altered under circumstances which make it still available. (18)

Thompson and Lachlan put their names upon this bill to enable Raines to pass it: Raines put it into the hands of an agent; and he could not pass it till 10th April, when he paid it for value to Howell, who passed it for value to plaintiff. Before it was paid to Howell, the date was altered to the 16th of March: Thompson did not know of this alteration till after the bill was paid to Howell, but as soon as he knew of it he assented to it. It was urged for defendant, that this alteration made a new stamp necessary; but upon a case reserved, the Court thought otherwise; for, though the bill had names upon it, so as to give it the semblance of an available bill before it was paid to Howell, it was not in fact an available bill till that payment; no person could have made a claim upon it, and if not, it was not to be considered as issued till that period, and then the alteration was in time; and though Thompson would not have been bound by the bill in its altered state, had he not assented to the alteration, but might have insisted that the alteration cancelled his acceptance, his subsequent assent bound him, and revived and continued his acceptance.

(18) *Henman v. Dickinson*, 5 Bing. 183. In an action by indorsee against acceptor, it appeared upon the face of the bill to have been altered from 40*l.* to 49*l.*, and the drawer's wife was called by defendant, to prove that the drawer altered it after the acceptance: her admissibility was objected to on the ground that her testimony criminated her husband, and that point was reserved; but Best C. J. being of opinion, that the onus of proof, to show that the alteration was made before the acceptance, lay upon the plaintiff, a verdict was given for defendant; and on motion to set aside that verdict, the Court agreed with him in opinion, and refused the rule.

Bishop v. Chambre, 1 Moody & Malkin, 116. In an action on a note, the paper and date exhibited a suspicious appearance, as if a former date had been cut off and another (May) sub-

If the alteration be in the hand-writing of the acceptor, the holder must prove that such alteration was made before the bill was parted with by the drawer. (19)

But proof that it was in the drawer's hands after it was accepted, will be *prima facie* evidence for that purpose. (19)

If the bill were put into an agent's hands to pay away, and it be left in doubt whether the date was altered before he paid it away or afterwards, it will not be sufficient. (20)

stituted: Lord Tenterden told the jury, it certainly lay on plaintiff to account for the suspicious form and obvious alteration of the note; and if they thought the alteration made after the note had been delivered to defendant, and became a perfect instrument, they should find for defendant, which they did.

(19) *Johnson v. Duke of Marlborough*, 2 Stark. 313. In action by indorsee against acceptor on bill payable to the drawer's order, the bill on production appeared to have been dated originally 29th December, 1816, but the date was altered to 29th January, 1817, and the alteration, which was immediately above the acceptance, was proved to be in defendant's hand-writing. Abbott J. intimated, that he must have proof that the alteration was made before the drawer indorsed away the bill; for, otherwise, a new stamp would have been necessary. Proof was then given that the bill was in the drawer's hands after defendant had accepted it, and that was considered *prima facie* proof that it had not been previously negotiated.

(20) In *Downes v. Richardson*, *antè*, p. 116. it was at first left in doubt when the date was altered, whether before or after the payment to Howell, and then the Court inclined against the plaintiff; it was afterwards ascertained that the alteration was before that payment.

C A P. V.

SECT. 1. *Of the Transfer of Bills or Notes.*

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BILLS or notes payable to order, or to bearer, or containing any words to make them assignable, may be assigned so as to give the assignee a right upon the bill or note against all the antecedent parties; and bills or notes containing no words to make them assignable may, where the stamp laws do not prevent it, be assigned so as to give the assignee a right upon them against the assignor, but (1) not so as to give him a right against any of the antecedent parties.

(1) *Hill v. Lewis*, Salk. 132. Moor drew one note payable to the defendant, or to his order, and another payable to him generally, without any words to make it assignable; the defendant indorsed them to Zouch, and Zouch to the plaintiff; the first objection was that the plaintiff had been guilty of laches, but the jury thought he had not: and it was then urged that the second note was not assignable; and Holt C. J. agreed

But it has been doubted, whether an English note is transferable abroad. Lord Tenterden said, it was a question of great importance, upon which he should be unwilling to give an opinion without hearing it very fully discussed, and giving it very great consideration. (2)

Bills and notes are assigned either by delivery only, or by indorsement and delivery. Whilst payable to order, they are assignable by the latter mode only; if payable originally to bearer, or if indorsed, as (3) they may be, so as to be payable to the bearer, by either.

On a transfer by delivery only, without indorsement, the person making it ceases to (4) be a party to the bill or note: on a transfer by indorsement, he (5) is, according to the legal operation, a new drawer.

that the indorsement of this note did not make him that drew it chargeable to the indorsee, for the words "*or to his order*" give authority to assign it by indorsement; but the indorsement of a note which has not these words is good so as to make the indorser chargeable to the indorsee.

(2) *De la Chaumette v. Bank of England*, 9 Barn. & Cr. 217.

(3) See post, pp. 123, 124.

(4) Vide *Ld. Raym.* 442. 774. 929, 930. 12 Mod. 203. 241. 408. 517. 521. *Salk.* 124. 128. 3 *Salk.* 68. *Comb.* 57.

(5) *Smallwood v. Vernon*, Str. 478. In an action against the indorser of a note, the declaration stated that he became chargeable according to the tenor of the indorsement; and it was objected that the indorsement might appoint the payment at a time different from that mentioned in the note; sed per cur. if it did, it would charge the indorser, for every indorsement is

Upon bills and notes for the payment of less than 5*l.* the indorsement (6) must be attested by a subscribing witness.

No particular (7) words are essential to an indorsement; the mere signature (8) of the indorser is in general sufficient.

But the indorsement of a bill or note for the payment of less than five pounds must (9) mention the name and place of abode of the indorsee, and bear date at or before the time of making it.

A promise to indorse, though on sufficient consideration, cannot be treated as an actual indorsement. (10)

Nor will it preclude the party from proving that an indorsement afterwards in his name is a forgery. (10)

the same as making a new note. Vide 2 Show. 501. Comb. 32. Skinn. 255, 256. 342. 411. 3 Mod. 87. 12 Mod. 36. Ld. Raym. 181. 444. 744. Salk. 125. 132, 133. 3 Salk. 68. Str. 442. 479. 1 Atk. 282. 2 Atk. 182. Burr. 670. 675. Dougl. 613.

(6) Vide 17 G.3. c.30. s. 1. antè, p. 12.

(7) Vide Holt. 117. Ld. Raym. 176. 810.

(8) Vide 12 Mod. 192. 244. Salk. 126. 128. 130. Ld. Raym. 444.

(9) Vide 17 G.3. c. 30. s. 1. antè, p. 112.

(10) *Moxon v. Pulling*, 4 Camp. 50. Defendant had accepted a bill he could not pay, and referred the holder to one May, to whom, he said, he had lent the acceptance. May proposed that plaintiff should take an acceptance of Hullett and Co., and that defendant should indorse it: defendant agreed, and said he would go and indorse it. Four days afterwards May sent plaintiff Hullett and Co.'s acceptance, with an indorsement in defendant's name; and plaintiff gave up defendant's acceptance:

But delivery without indorsement, where indorsement is essential, and where it is omitted by mistake, will entitle the party to call for an indorsement afterwards; (11)

And if the party, who ought to have made it, afterwards become bankrupt, will prevent his assignees from claiming the bill or note. (11)

An indorsement which mentions the name of the person in whose favour it is made, is called a full indorsement; an indorsement which does not, a blank one.

A blank indorsement, so long as it continues blank, makes a bill or note payable to the (12)

the indorsement in defendant's name was a forgery, and defendant being sued as indorser, Lord Ellenborough said, "You cannot establish any agency to indorse: when the promise was given, the bill does not appear to have existed, and all was *in fieri*: defendant might repent and refuse to indorse; he may be liable for breach of promise, but cannot be sued as indorser." Nonsuit.

(11) See *Smith v. Pickering*, post. 197.

(12) *Peacock v. Rhodes*, Dougl. 611—633. A bill was drawn by the defendant, payable to Ingham or order. Ingham indorsed it in blank, after which it was stolen; the plaintiff took it *bonâ fide*, and paid a valuable consideration for it, and acceptance and payment being refused, gave notice to the defendant, and brought this action. A case was reserved for the opinion of the Court, and it was contended that this bill was not to be considered as payable to bearer, and that the plaintiff had no better right upon it than the person of whom he took it; but the Court said, there was no difference between a note indorsed in blank, and one payable to bearer, and the plaintiff had judgment. *Francis v. Mott*, N. P. before Lord Mansfield, cited Dougl. 612., was a similar case, and the at-

bearer; but the holder may write over it what he pleases.

And the holder, by writing a direction over the indorsement, ordering the money to be paid to particular persons, without adding his own name, does (13) not become an indorser.

As long, however, as the first indorsement continues blank, the (14) bill or note, as against the payee, the drawer, and acceptor, is assignable by mere delivery, notwithstanding it may have upon it subsequent full indorsements.

torney-general, who was for the defendant, after attempting unsuccessfully to show that the plaintiff *knew* the bill was obtained unfairly, gave up the cause.

(13) *Vincent and another v. Horlock and another*, 1 Campb. N. P. C. 442. In an action against the defendants as indorsers of a bill, it appeared that the payee had indorsed it in blank to the defendants, and that they had written over the payee's signature, "Pay the contents to Vincent and Co." Lord Ellenborough was clearly of opinion that this was not an indorsement by the defendants; and the plaintiffs were nonsuited.

(14) *Smith v. Clark, Peake*, 225. A bill was indorsed in blank by the payee, and after some other indorsements was indorsed to Jackson or order; Jackson sent it to Muir and Atkinson, but did not indorse it, and Muir and Atkinson discounted it with the plaintiffs: the plaintiffs struck out all the indorsements except the first, which continued blank. This was an action against the acceptor, and it was objected, that the plaintiffs could not recover without an indorsement by Jackson; but Lord Kenyon held otherwise, and the plaintiffs recovered. The plaintiffs afterwards proved that Jackson desired Muir and Atkinson to discount this bill, but Lord Kenyon thought the plaintiff's case made out without this evidence.

A full indorsement may restrain the negotiability of a bill or note.

An indorsement is restrictive, which has express words making it so, or is made in favour of a person who cannot make a transfer.

Thus an indorsement in these words, "Pay the contents to I.S. only," "to I.S. (15) for my use;" or (at least when addressed to the drawee) (16)

(15) *Per Wilmot J. Burr. 1227. Blackst. 299.* The payee may check the currency of a bill or note by giving a bare authority to receive the money; as "Pay to A. for my use;" and *per Lord Hardwicke in Snee v. Prescott, 1 Atk. 249.* "Bills and notes are frequently indorsed in this manner, "Pray pay the money to my use," in order to prevent their being filled up with such an indorsement as passes the interest."

Sigourney v. Lloyd, 8 Barn. & Cr. 622. 5 Bing. 525. Plaintiff indorsed a bill for 316*l.* 11*s.* 8*d.* to S. Williams in these words, "Pay to Samuel Williams, Esq., of London or his order for my use:" the day after Williams received it, he discounted it with defendants, his bankers, and they applied the produce and other monies of Williams, the same day, to take up Williams's acceptances. Defendants having received the money upon this bill, plaintiff insisted he was bound to pay it over to him, the state of accounts and transactions between plaintiff and Williams not having warranted Williams to part with the bill, and the indorsement being restrictive: case with liberty to turn it into a special verdict, and on argument Lord Tenterden and Bayley J. (the only Judges in Court) thought it clear that the indorsement was restrictive; that the defendants discounted it at their peril; and that, at all events, the application of the produce to Williams's acceptances, when the state of accounts between Williams and plaintiff did not justify such application, could not be supported: *postea* plaintiff. The defendant brought a writ of error: the Court of Exchequer Chamber agreed with B. R., and the judgment was affirmed.

(16) *Anchor v. Bank of England, Dougl. 615. 637.* A bill was drawn by the plaintiffs upon Claus Hcide and Co. payable

"the within must be credited to I.S.," is restrictive.

An indorsement, "Pay the contents to A. B. on "my being gazetted ensign in a given time" is restrictive, and will give no subsequent indorsee a right, unless he be so gazetted. (17)

to Jens Mæstue or order. Mæstue indorsed it to this effect : "The within must be credited to Captain M. L. Dahl, value in account," and sent it to Claus Heide and Co., who credited Dahl for the amount, and gave notice to Dahl and the plaintiffs that they had done so; an indorsement by Dahl was afterwards forged upon the bill, and the bank discounted it. Claus Heide and Co. having become insolvent, Fulberg paid it for the honour of the plaintiffs, and upon the ground that the indorsement had restrained the negotiability of the bill, they brought an action for money had and received against the bank: Lord Mansfield directed a nonsuit; but upon a rule to show cause why there should not be a new trial, and cause shown, Lord Mansfield, Willes, and Ashhurst, Js. thought the indorsement restrictive, and that the plaintiffs were entitled to recover; but Buller J. thought otherwise; upon which, Lord Mansfield said, the whole turned on the question, whether the bill continued negotiable? and if they altered their opinion, they would mention the case again; but it never was mentioned afterwards, and upon a new trial Lord Mansfield directed the jury to find for the plaintiffs, which they did.

(17) *Robertson v. Kensington*, 4 Taunt. 30. Bill payable to plaintiff or order: he indorsed it, "Pay the within to Clerk "and Ross, or order, upon my name appearing in the Gazette "as ensign in any regiment of the line between the 1st and "64th, if within two months from this date:" the bill was at forty-five days after date: defendants accepted it after it was so indorsed: Clerk and Ross indorsed it over, and after passing through several hands it came to the bank, and defendants paid it: plaintiff's name was never in the Gazette, and he therefore insisted the payment by defendants was wrongful, and that he

An indorsement, "Pay to A. or order, for account of B.," will not prevent A. from indorsing for value, if it be under circumstances which may induce a belief that such value is to be applied to B.'s use; (18)

But it will from indorsing by way of pledge for the private debt of A; (18)

Or for advances to A. on his own account.

But an indorsement is not restrictive, merely because it expresses what is the consideration for it.

Therefore this indorsement, "Pay the contents to I. S., being part of the consideration in a certain deed of assignment, executed by the said I. S. to the indorser and others," is (19) not restrictive.

was entitled to the money. He accordingly brought an action, and on a case reserved, the Court was of that opinion, and decided for the plaintiff.

(18) *Treuttel v. Barandon*, 8 Taunt. 100. Two bills were indorsed "Pay to J. P. De Roure, Esq. or order, for account of Messrs. Treuttel and Würtz:" De Roure indorsed them, and gave them to defendants as a security on his own account: he was indebted to them at the time to more than the value of the bills, and they afterwards advanced him money on these bills: De Roure failed, and Treuttel and Würtz brought trover for the bills. Gibbs C. J. thought this indorsement sufficiently intimated that the bills were not the property of De Roure, and under his direction, verdict for plaintiffs: and on rule nisi for new trial, the Court thought, that though he might not be restricted from discounting, and might pass a good title to a person who might suppose they were passed to the use of plaintiffs, he could not pledge them on his own account, and rule discharged.

(19) *R. Potts v. Reed*, 6 Esp. N. P. C. 57.

And the (20) mere omission of words to give a power of transfer, will not make an indorsement restrictive.

A restrictive indorsement precludes the person in whose favour it is made from making a transfer so as to give a right of action against either the

(20) *Moore v. Manning*, Com. 311. A note was drawn by the defendant payable to Statham or order; Statham indorsed it to Witherhead, but did not add "or to his order," and Witherhead indorsed it to the plaintiff. The defendant contended, that as there were no express words to authorise Witherhead to assign it, he had no such power, but the whole Court resolved, that as the bill was at first assignable by Statham as being payable to him or order, and as all Statham's interest was transferred to Witherhead, the right of assigning it was transferred also, and the plaintiff had judgment.

Acheson v. Fountain, Str. 557. Bull. N. P. 275. A bill was payable to Abererombie or order, and he indorsed it thus, "Pray pay the contents to Louisa Acheson." This being stated in the declaration as an indorsement to Acheson or order, it was objected that it was a fatal variance; but upon consideration the whole Court was of opinion against the objection, because this was the legal import of the indorsement, and Louisa Acheson was authorised by it to make an indorsement over.

Edie v. East India Company, Blackst. 295. Burr. 1216. A foreign bill drawn upon the East India Company was payable to Campbell or order; Campbell indorsed it to Ogilby, but did not insert the words "or order," or any similar words in the indorsement; Ogilby indorsed it to the plaintiffs. It was insisted, that under the indorsement to Ogilby he had no authority to indorse it over, and upon that ground the jury found for the defendants; but upon a rule to show cause why there should not be a new trial, and cause shown, the Court was clear, that as the bill was originally in its nature negotiable, it continued so in the hands of Ogilby, and that his indorsement was good; and a new trial was granted.

person making it, or any of the antecedent parties; and if payment be made to the person to whom such transfer is made, the party paying may, under circumstances, be liable to pay the money a second time (21), or the person receiving it may be liable to refund. (22)

An (23) indorsement cannot be made for the transfer of less than the full sum appearing to be due upon the bill or note.

Sect. 2. — Where indorsement is necessary to make a transfer, an indorsement will convey no title, except against the person making it, unless it be made by him who has a right to make the transfer: a transfer by delivery may.

(21) Vide *Robertson v. Kensington*, antè, p. 126. note.

(22) Vide *Ancher v. Bank of England*, antè, p. 125. note (16). *Sigourney v. Lloyd*, antè, p. 125. note (15).

(23) *Hawkins v. Cardy*, Ld. Raym, 360. Carth. 466. 12 Mod. 213. Salk. 65. In an action upon a bill drawn by the defendant for 46*l.* 19*s.* payable to Blackman or order, the declaration stated that Blackman indorsed 43*l.* 4*s.* of it to the plaintiff; the defendant pleaded an insufficient plea, upon which the plaintiff demurred; but the whole court held the declaration bad, because the bill could not be indorsed for less than all the money due thereon, and the plaintiff discontinued his action. And per Gould J., in *Johnson v. Kennion*, 2 Wils. 262. "where the drawer of a bill has paid part, you may indorse it over for the residue; otherwise not, because it would subject him to a variety of actions."

Therefore, in case of a loss by theft or accident, if the bill or note be assignable by mere delivery, the thief or finder may (24) confer a title by trans-

(24) *Anon.* *Ld. Raym.* 738. *Salk.* 126. 3 *Salk.* 71. B. lost a bank bill payable to A. or bearer; C. found it, and assigned it for a valuable consideration to D., who got a new bill for it from the bank. Trover was then brought against D. for the first bill; but by *Holt C. J.* "the action will not lie against *him*, "because he took it for a valuable consideration, though it "would against C., as he had no title; but payment to C. "would have indemnified the bank."

Miller v. Race, *Burr.* 452. A bank note payable to William Fenney, or bearer, was stolen out of the mail in the night of the 11th of December, 1756, and on the 12th came to the hands of the plaintiff for a full and valuable consideration, in the usual course of his business, and without any knowledge that it had been taken out of the mail; he afterwards presented it at the bank for payment, and the defendant, being one of the clerks, stopped it, upon which an action of trover was brought; and upon a case reserved upon the point, whether the plaintiff had a sufficient property in the note to entitle him to recover, the Court was clear in opinion that he had, and that the action was well brought. *Vide Lawson and others v. Weston and others.* 4 *Esp. N. P. C.* 56.

Grant v. Vaughan, *Burr.* 1516. Vaughan gave Bicknell a draft upon his banker payable to "Ship Fortune, or bearer." Bicknell lost it, and the plaintiff afterwards took it, *bonâ fide*, in the course of trade, and paid a valuable consideration for it: the banker refused to pay it, upon which the plaintiff brought this action against Vaughan. Lord Mansfield left it to the jury to consider, 1st, whether the plaintiff came to the possession of the bill fairly and *bonâ fide*; and 2dly, whether such draft was in fact and practice negotiable; and the jury found for the defendant: but upon an application for a new trial, and cause shown against it, the court was clear that the second point ought not to have been left to the jury, because it was clear that such drafts were negotiable; and if the jury thought the

ferring it; if it be assignable by indorsement only, he (25) cannot.

If a bill or note transferable by delivery be lost, the loser should give immediate notice thereof to the drawee, or persons who are to pay it. (26)

And if such persons afterwards pay it to a person who has not taken it *bonâ fide*, or paid value for it, they will be responsible to the loser. (26)

plaintiff took the note fairly and *bonâ fide*, of which there appeared to be no doubt, he was entitled to recover. A new trial was accordingly granted, in which the plaintiff recovered the money. *Peacock v. Rhodes*, Dougl. 611. 633. antè, p. 123. note (12).

By 9 & 10 W. 3. c. 17. § 3. "If any inland bill be lost, or miscarry within the time limited for its payment, the drawer shall, on security given upon request to indemnify him if such bill shall be found again, give another bill of the same tenor with the first." And it should seem that the equity of this statute would comprehend indorsements also, and that the 3 & 4 Anne, c. 9. (which gives the like remedies upon notes as were then in use on inland bills) would extend it to notes. See *Walmsley v. Child*, 1 Ves. Sen. 341.

See post, Chap. IX., in what cases an action may be maintained where a bill or note has been lost.

(25) In this case, however, it is advisable for the loser, in order to guard against the forgery of his indorsement, to give immediate notice of the loss to all the antecedent parties, and if payment has been made before such notice could be given, to apprise the payee thereof without delay.

(26) *Lovell v. Martin*, 4 Taunt. 799. Plaintiff lost a bill accepted payable at defendant's, and immediately gave notice thereof to the acceptor, and the acceptor communicated the notice to defendants with a request that they would not pay or discount the bill: they afterwards (probably from inadvertence) discounted it for one Powell, who had it from a child who picked it up: when due they wrote a receipt upon it, and

The right to transfer a bill or note is in the payee, or in the person to whom it has been transferred from him.

And if a bill or note be deposited with a banker for a particular purpose, and be indorsed so as to give him the right to transfer it, and he (27) (28)

debited the acceptor with the amount. Plaintiff brought trover, and there being no proof that Powell took it *bonâ fide* or paid value, verdict for plaintiff. Rule nisi for nonsuit on the ground that plaintiff had not demanded the bill of defendants, and without such demand trover would not lie; but the Court held the writing a receipt upon it, and debiting the acceptor with the amount was a conversion; rule discharged.

(26) *Bolton v. Puller*, 1 Bos. and Pull. 539. Forbes and Gregory, traders in London, were also partners in the house of Caldwell and Co. in Liverpool. Bolton dealt with Caldwell and Co., and they prevailed upon the house in London to let him make his bills payable there. Bolton kept no account but with the house at Liverpool; and they kept the account with the house in London; and the payments on Bolton's bills, when made, were carried by the house in London to *their* account with the house in Liverpool; and by the house at Liverpool to their account with Bolton. In Feb. 1793, he accepted bills payable at the house in London, to the value of 19,702*l.*; and to enable the Liverpool house to provide for their payment, he indorsed to them (among other bills) a bill for 4000*l.* and another for 398*l.* These two bills they remitted generally, with many others, to Forbes and Gregory, to whom they were considerably indebted; but before the latter bill arrived, both houses became bankrupt. The acceptances were payable before the indorsed bills. Bolton was obliged to pay all his own acceptances; and the assignees of Forbes and Gregory having refused to deliver up these bills, he brought trover for them. A special verdict was found; and after two arguments, the Court were unanimously of opinion, that the assignees were entitled to keep the bills. They admitted, that as Forbes and

negotiate, or (28) pledge it; such negotiation or pledging, although it may amount to a gross breach of trust and defeat the purpose for which the deposit was made, will, as between the person who

Gregory were partners in the Liverpool house, they were to be considered as privy to the fact that the bills had been indorsed to that house to enable it to provide for Bolton's acceptances; but they held that the application which had been made of these bills, was the very thing which Bolton intended; and that therefore the privity of the London house in the agreement made between him and the house at Liverpool, could have no effect on the transaction, which, *as between the two houses, had undoubtedly changed the property in the bills*: that for the purpose of providing for Bolton's acceptances, the house at Liverpool was intitled to deal with the bills as it thought fit: that they had therefore a right to remit them to Forbes and Gregory; and as they were indebted to Forbes and Gregory in more than the amount, the assignees of Forbes and Gregory were entitled to keep them. Judgment for the defendants.

(28) *Collins v. Martin*, 1 Bos. and Pull. 648. The plaintiff sent bills, indorsed in blank, to Messrs. Nightingales, to receive the money upon them: they borrowed money of the defendants, and pledged these bills as a security. They afterwards became bankrupt, and the plaintiff brought trover for the bills. There being no evidence that the defendants knew under what circumstances the bills had been left with Messrs. N., or how the plaintiff's account (he being in cash) stood with them, Eyre C. J. thought the action would not lie, and nonsuited the plaintiff. On a rule nisi to set aside the nonsuit, it was urged that though the Messrs. N. might have negotiated the bills, they could not pledge them; but after consideration, the Court was unanimous, that they had the power of binding the plaintiff as well by pledging as negotiating the bills, of which they were enabled to hold themselves out to the world as the absolute owners. Rule discharged.

made the deposit and an innocent holder of the bill or note, be binding upon the former.

An indorsement by a person of the same name with the person entitled to transfer it (29) will pass no right to the indorsee, though there be no particular description on the bill or note of the person entitled to transfer it.

But such indorsement, if made innocently, will bind the person making it, and the subsequent indorsers.

On a bill or note payable to A. for the use of B., the (30) right to transfer is in A.

(29) *Mead v. Young*, 4 Term Rep. 28. A bill payable to Henry Davis or order, was sent by the post, and got into the hands of a wrong Henry Davis, who indorsed it to the plaintiff: there was no description of Henry Davis in the bill, or addition to his name, nor was any fraud imputable to the plaintiff. This was an action against the acceptor, and on his offering evidence to shew that the Henry Davis who indorsed the bill was not the person in whose favour it was drawn, Lord Kenyon was of opinion that the evidence was inadmissible, and he retained that opinion after cause shewn against an application for a new trial; but Ashhurst, Buller, and Grose, Js. held, that unless the indorsement were made by the person to whom the bill was really payable, it was a forgery, and could confer no title, and that therefore it was competent for the defendant to shew that the person who indorsed the bill was not the person in whose favour it was made, and a new trial was accordingly granted.

(30) *Evans v. Cramlington*, Carth. 5. 2 Vent. 307. Skinn. 264. A bill was payable "to Price or order, for the use of Calvert." Price indorsed it to Evans, after which an extent issued against Calvert, and the money due upon it was seized to the use of the King. These facts appearing upon the pleadings, two points were made upon demurrer: the one, whether Calvert had such

Sect. 2.] *not Partners.—Feme Payee marrying.* 135

On a bill or note payable to *several persons*, not in partnership, the right to transfer it is in all collectively, not (31) in any individually.

If the right to transfer a bill or note be in a feme sole, and she marry, it (32) devolves upon her husband.

If a bill or note be made payable to a feme covert, the right to transfer it is in the husband; the wife cannot transfer unless as agent to him.

But if she do, and the husband promise to pay,

an interest in the money as might be extended; and the other, whether Price had power to indorse the bill, or whether he had only a bare authority to receive the money for the use of Calvert: and the Court of King's Bench, and afterwards the Exchequer Chamber, held that Calvert had not such an interest as could be extended, and that Price had power to indorse the bill; and judgment was given for the plaintiff.

(31) See *Carvick v. Vickery*, *antè*, p. 52.

(32) *Connor v. Martin*, Str. 516. cited 3 Wils. 5. A bill was made payable to Susan Connor, or order, while she was sole: she married, and during her coverture indorsed it to the plaintiff; and upon demurrer and argument, the Court of Common Pleas held, that the feme covert could not assign the note, because by the marriage it became the sole right and property of the husband; and by *Parker C. J. in Miles v. Williams*, 10 Mod. 246., "if a note be payable to a feme sole or order, and she marries, her husband is the proper person to indorse it."

McNeilage v. Holloway, 1 Barnw. and Ald. 218. A bill was payable to a feme sole or order; she married before it became due; her husband brought an action upon it in his own name; and on a rule to shew cause why the judgment should not be arrested on the ground that the wife should have joined in the action, the court held that as this was a negotiable security, the marriage transferred the property to the husband, and entitled him, if he thought fit, to sue alone.

it will be evidence (33) that she had authority from her husband to transfer.

If a bill be payable to an infant, an indorsement by him will convey (34) no interest, as against himself; but if he draw the bill, it may against the acceptor. (34)

If the person who has the right to transfer a bill or note die, it (35) devolves upon his personal representative; if he become bankrupt, and he holds the bill or note in his own right, it devolves upon his assignees.

If the person who has right to transfer,* deliver over a bill or note for a valuable consideration, and forget to indorse it, and die, his executor or administrator may indorse it. (36)

And it will be no objection to an indorsement by an administrator, that he took out administra-

(33) See *Cotes v. Davis*, *antè*, p. 47.

(34) See *Taylor v. Croker*, 4 Esp. N. P. C. 187. *post*.

(35) *Rawlinson v. Stone*, 3 Wils. 1. Str. 1260. 2 Barnes, 137.

A note was payable to A. B. or order: A. B. died intestate, and his administrator indorsed it to the plaintiff. These facts appearing upon the declaration, the defendant demurred, and contended that the personal representative of the payee had no power to indorse a note; but the Court of Common Pleas after three arguments, and the Court of King's Bench upon error brought, were unanimously of opinion that he had; and each court said, it was every day's practice, and the constant usage, for executors and administrators to indorse bills and notes payable to the order of their testators or intestates.

(36) *Watkins v. Maule*, 2 Jac. & W. 237. Sir Rt. Salusbury re-mitted to Down and Co. a note for 2000*l.*, drawn by Hall, payable to Sir R. S. or order, but not indorsed by him: Down and Co.

tion for the very purpose of making the indorsement. (36)

Or that the indorsement was to himself and his partners. (36)

If the person who should have indorsed become bankrupt, he may nevertheless make the indorsement. (37)

gave Sir R. credit for the amount, and he drew it out from the house: the note was paid when due; but, on an explanation from Hall, that Sir R. had assured him he should not be called upon for payment, unless there should be a deficiency on the sale of Sir R.'s estates, Down and Co. returned him the money, and took back the note: Sir R. became bankrupt, and his estates proving insufficient, Down and Co. sued Hall, but Hall agreed to give bond for the amount, paid the costs, and the proceedings were stayed: before the bond was given, Hall died; Sir R. died also, and Down and Co., having petitioned to be admitted creditors upon Hall's estate, and their claim being rejected, it was then for the first time discovered that Sir R. had not indorsed the note: Down thereupon took out administration to Sir R., and indorsed the note to himself and partners. The Master persisting in rejecting the claim, Down and Co. petitioned for leave to file exceptions to the Master's report. Plumer M. R. thought it clear that, if the facts were as stated, the indorsement was valid, and the claim good; but, there being some dispute as to the facts, he referred it back to the Master that he might review his report.

(37) *Smith and another v. Pickering, Peake, N. P. C. 50.* Richardson and Hill drew a bill on the defendant, payable to their own order, which the defendant accepted. The drawers delivered this bill to the plaintiffs for a valuable consideration, but forgot to indorse it. They afterwards became bankrupts, and then indorsed it. The plaintiffs, as indorseees, sued the defendant as acceptor. Lord Kenyon was clearly of opinion that the indorsement was good, and the plaintiffs had a verdict.

Or his assignees may be compelled to make it. (38)

At least if the person requiring it would otherwise be a creditor to the amount. (38)

But the indorsement must be so framed, as not to make the assignees personally liable. (38)

If the right to a bill or note be in several partners, and some of them become bankrupt, and afterwards indorse it, such indorsement, though made to a creditor of the partnership, will confer (39) no title on the indorsee.

And if the creditor receive the money due upon the bill or note, the solvent partners, together with the assignees of the bankrupts, (39) may recover back the money so received.

(38) *Ex parte Mowbray*, 1 Jac. & Walk. 428. Everest, who afterwards became bankrupt, having transferred a bill to Mowbray for valuable consideration, but without indorsing it, though he was payee, Mowbray petitioned that the assignees might be ordered to indorse it; otherwise, he claimed to be a creditor for the amount. The assignees opposed it. Lord Eldon said, the difficulty was to frame an order for a special indorsement, that would prevent the assignees from being personally liable: if a special indorsement were made, with which Mowbray would be content, he felt no difficulty in making the order.

(39) *Thomason and others v. Frere and others*, 10 East's Rep. 418. Thomason, Underhill, and Guest, were partners in trade at Birmingham; and being debtors to the defendants to the amount of 1800*l.*, and creditors upon Gamble and Co. for 1450*l.*, Underhill and Guest, on the 11th October 1807, without the consent or knowledge of Thomason (who was abroad), indorsed to the defendants a bill drawn by the firm of Thomason, Underhill, and Guest, upon, and accepted by, the

But if a man hold a bill or note, not in his own right, but as a trustee, his bankruptcy will not pass the right to transfer to his assignees. (40)

And if partners hold a bill or note, as trustees, the bankruptcy of one of them will not preclude him and the others from transferring it. (40)

agents of Gamble and Co. for this 1450*l.* Underhill and Guest had, on the 7th October, 1807, committed acts of bankruptcy, upon which separate commissions issued on the 19th. The bill for 1450*l.* became due on the 6th December, and was then paid; and to recover this money, the present action was brought by Thomason and the assignees of Underhill and Guest. The house of Thomason, Underhill, and Guest, was still indebted to the defendants beyond the amount of the sum now sought to be recovered. — The plaintiffs were nonsuited. But on a rule nisi for a new trial, the Court (Lord Ellenborough C. J. absente) held that the indorsement, having been made after an act of bankruptcy, though before the issuing of the commission and for the purpose of paying a partnership debt, was invalid; and they inclined to think that, this action being brought to recover the money received on the bill, which had been thus wrongfully indorsed, the defendants had no right to set off their demand upon the firm against this claim by Thomason and the assignees. Rule absolute.

(40) *Ramsbottom and others v. Cator*, 1 Stark. 228. J. and M. Hervey were partners as bankers; defendant delivered them a bill that they might get it discounted; they passed it to plaintiffs, their bankers; but before they did so, J. H. committed an act of bankruptcy, upon which a commission afterwards issued: it was urged for defendant that the bankruptcy of J. H. destroyed his and his partner's right to pass away the bill; but Lord Ellenborough held, that as the Herveys held it upon a special trust, to get it discounted, and not in their own right, no interest in it passed to the assignees of J. H.; and though he doubted whether plaintiffs had an interest beyond what the Herveys had, he allowed them to take a verdict, and

If the consideration upon which bills are given fail, and the person to whom they are given have them in his hands, and become bankrupt, they belong, not to the assignees, but to the person who gave them, and shall be restored to him. (41)

So the right to indorse will not devolve upon a bankrupt's assignees, if (42) neither he nor they would have any right to demand payment.

Therefore, if a bankrupt draw a bill payable to his own order, having at the time (42) no effects

gave the defendant leave to take the opinion of the court upon the point. — But the defendant did not move it.

(41) *Ex parte M'Gae*, in *re Wood*, 1816. 2 Rose 376. 19 Ves. 607. There was a bargain between Wood and Co., bankers at Workington, and M'Gae, that M'Gae should have their notes for any short bills he should pay into their bank: 23d July he took by anticipation 105*l.* in their notes, and 24th paid in two bills for 75*l.* and 70*l.* Commissions of bankruptcy had issued against three members of the Workington bank 22d July, and on 4th August one issued against the remaining partner. The separate commissions were superseded in favour of a joint one, and M'Gae petitioned to have the two bills returned, he returning the notes; and on hearing, Lord Eldon C. ordered it. — M'Gae's bargain was to have the notes of the house whilst it was going on as a house, and nothing had occurred to put an end to it; these he has not got, and the consideration for which he gave the bills has failed.

(42) *Arden v. Watkins*, 3 East's Rep. 317. On the 5th of October, 1801, Lewis Jones committed an act of bankruptcy, on which a commission issued on the 31st December, 1801. On the 4th of December, 1801, he drew a bill on Watkins for 100*l.* payable to his own order, and indorsed it to the plaintiff, who paid him the full value. Watkins owed Jones nothing, but accepted the bill to enable him to raise money upon it, and Jones deposited a lease with him as an indemnity: the assignees

in the hands of the drawee; or if, having effects, he draw it for a sum (43) exceeding their amount, and the bill be accepted for his accommodation;

insisted upon a restoration of the lease, and Watkins refused to pay the bill. — Action on the bill and reference. The arbitrator awarded against Watkins, but stated the facts specially, to enable him to take the opinion of the court. After a rule nisi to set aside the award, cause shewn, and time taken to consider, the Court was clear that the defendant was liable; that as Jones had no effects in Watkins's hand, no right to indorse nor any claim upon the bill devolved on his assignees; and that therefore his indorsement was effectual, and transferred the property to the plaintiff. Rule discharged.

(43) *Willis v. Freeman* and another, 12 East's Rep. 656. In an action by the indorsee of a bill against the acceptors, a verdict was found for the plaintiff, subject to the opinion of the Court upon a case. The case stated, that Anderson, the drawer, being indebted to the plaintiff in more than 2000*l.*, and being insolvent, proposed to pay the plaintiff a composition of 13*s.* 6*d.* in the pound, together with the costs of an action which had been brought by the plaintiff against him, by a bill upon the defendants. This proposal being acceded to, Anderson applied to the defendants to accept a bill for 1400*l.* for his accommodation. The defendants accepted the bill, drawn on the 5th of July, and payable on the 10th of November, 1809, having in their hands effects of Anderson's to the amount of 888*l.* 16*s.* 8*d.* Anderson had committed a secret act of bankruptcy on the 7th of March, 1809, upon which a commission issued on the 25th of July. The Court of King's Bench held, that to the extent of 888*l.* 16*s.* 8*d.* the defendants had a right to resist payment on the ground of their being answerable for that amount to the assignees, to whom these funds devolved upon the act of bankruptcy; and that therefore the indorsement by Anderson to that extent was inoperative: but as to the surplus (511*l.* 3*s.* 8*d.*) for which the acceptance was accommodation, the case of *Arden v. Watkins* was in point to shew that the indorsement was valid. And they held that the law in this

his indorsement will, in the former case, confer a good title as to the whole sum mentioned in the bill; and in the latter, as to such sum as is not covered by the effects. Because, in the one case the assignees have no claim, in the other they have none beyond the amount of the effects.

So, if a trader get a bill by fraud, and become bankrupt, the bill will belong, not to his assignees, (44) but to the person from whom he obtained it; at least if he promised, before he became bankrupt, to return it.

So, if a banker who has a lien on a bill or note for his general balance, deliver it to his customer when it is due, that he may obtain payment, and the customer become bankrupt, the bill or note will

respect had not been altered by the 49th Geo. 3. c. 121. § 8. They therefore ordered the verdict to be entered for this reduced sum of 511*l.* 3*s.* 4*d.*

(44) *Gladstone v. Hadwen*, 1 M. & S. 517. Sill and Co. got bills from Hadwen under colour of giving him a security upon some coffee, to which however they had no title: on being pressed by Hadwen, they promised to return him the bills, which were on their way from London to Liverpool; but before they arrived, Sill and Co. committed acts of bankruptcy, upon which a commission afterwards issued: when the bills arrived, they were delivered to Hadwen, upon which, Sill and Co.'s assignees brought trover; but on case and time to consider, the Court held that they could not sue for what a court of equity would not have allowed them to keep; and that as Hadwen would never have parted with the bills but for a false pretence and fraud, a court of equity would have compelled the assignees, who claimed under Sill and Co., had they got the bills, to deliver them up to Hadwen.

rupt, bills paid in by his customers, remaining in his hands, will, subject to the banker's lien thereon, belong, *prima facie*, not to the assignees but to the respective customers (48);

(48) *Zinck v. Walker*, Bl. 1154. Zinck employed Jenner as his London banker, and drew on him under an agreement to make remittances to answer the bills when due: Jenner became bankrupt, being a creditor of Zinck for 195*l.*, and under acceptances for him to the amount of 1022*l.*, but he had in his possession two bills which Zinck had remitted him for 450*l.*: the assignees received the money upon these bills; and Zinck, having paid the bills for 1022*l.*, called upon them for the balance of the 450*l.*, after deducting thereout the 195*l.*: the assignees refused to pay it; but, upon action and case, the Court thought the bills were to be considered as remitted for a particular purpose, *viz.* to pay the balance and discharge the acceptances, and that, subject thereto, they were the property of Zinck.

Giles v. Perkins, 9 East, 12. Plaintiffs on the 12th of November paid into the bank of D. and Co., at Birmingham, three bills due in December and January following, and indorsed by plaintiffs: 18th November D. and Co. became bankrupt, being considerably indebted to plaintiffs on their cash and bill account, independent of those bills: it was stated as the practice of this bank to enter the undue bills brought by customers, if approved, as cash to the credit of the customer, giving him cash, or liberty to draw to their amount; and the bankers, as convenience required, paid them away in the course of business, or sent them to their correspondents in London: interest was charged on both sides of the account, and, if the interest account were against the customer, the bankers charged a commission. The assignees refused to deliver up these three bills, and received payment of them when due: action for money had and received, and *Ld. Ellenborough* was of opinion in favour of plaintiffs, who obtained a verdict; a rule *nisi* for new trial was refused; and, per *Ld. Ellenborough*, "every man who pays a bill not due into the hands of a banker places it there

“ as in the hands of an agent, to obtain payment of it when due :
“ if the banker discount the bill, or advance money on the credit
“ of it, that alters the case ; in the one case he obtains the entire
“ property in the bill ; in the other he has a lien on it *pro tanto* ;
“ but he can have no lien upon it till his account is over-drawn.”

Ex parte Rowton, 1 Rose, 15. *Brickwood and Co.*, bankers in London, became bankrupt : they were acceptors for the Chester bank to the amount of 26,070*l.*, and had in their hands, belonging to the Chester bank, 25,272*l.*, and short bills to the amount of 20,501*l.* The Chester bank petitioned, that upon payment by them to the assignees of the difference between the 26,070*l.* and the 25,272*l.* (the acceptances by the bankrupts and the cash balance), so as to cover the whole amount of the acceptances, the assignees should deliver to them the short bills ; *Ld. Eldon* ordered accordingly.

Ex parte Sargeant, 1 Rose, 153. (1810). *Burrough*, a banker at Salisbury, became bankrupt : *Sargeant* banked with him, and was in the habit of paying in cash and bills, which were entered, without distinction, in a general account. Before *Burrough* failed, *Sargeant* paid in two bills, which did not become due until after *Burrough*'s bankruptcy : *Burrough* had remitted them to *Kensington and Co.*, his town bankers, and they were in *Kensington and Co.*'s hands when *Burrough* failed : *Kensington and Co.* were not in advance for *Burrough*, and had no claim on these bills, but they refused to deliver them to *Sargeant*, and received the amount, which they paid to the assignees : *Sargeant* petitioned, that the assignees might pay the proceeds to him ; and, upon argument, *Ld. Eldon C.* was clear he was entitled to them ; unless it were the bargain between *Sargeant* and *Burrough*, or from the habits of dealing between them it could be inferred that it was understood between them, that bills paid in before they were due were to be considered immediately as cash : and he declared him entitled, unless by his consent, or the habit of dealing between the parties, the bills were to be considered as cash.

Ex parte the Hull, Wakefield, and other country banks, in the matter of *Boldero*, 19 Ves. 25. 1 Rose, 232. *Boldero and Co.* were the London bankers to the country banks of *Pease and Co. of Hull*, *Townend and Co. of Wakefield*, *Farley and Co. of York*, *Daniel and Co. of Yeovil*, and *Banks and Co. of*

Leeds and Thirsk. They became bankrupt, having in their hands bills remitted from each of these houses, and the question upon petition was, whether such bills continued the property of the respective houses or belonged to the assignees. The half-yearly accounts in all the cases contained the *cash* receipts and payments, and interest thereon, and an account of the bills remitted; but those bills were not carried to the cash account till the money upon them was received; in the case of the Hull bank the accounts transmitted to them described the undue bills as "the property of Pease and Co.," and in the case of the Wakefield bank, Boldero and Co., in acknowledging the receipt of some of the latest remittances, used the expression, "which we hold in reserve at your disposal." The Wakefield bank had, in some instances, directed discounts to diminish the cash balance when over-drawn, and in one instance they adopted a previous discount to the extent of 5000*l*. Boldero and Co. had also discounted some of the Wakefield bills for their own purposes, but they concealed that fact in the accounts they rendered. The Wakefield bank made Boldero and Co. an allowance, which came to 700*l*. per annum: all the other banks, except the Hull, had occasionally permitted the discount of bills they had remitted. After time to consider, Ld. Eldon C. treated each case separately, and held, that the bills in each belonged to the house by which they had been remitted: in the Hull bank case he noticed the express declaration that the bills belonged to that house; in the Wakefield case, the expressions used in acknowledging the remittances; the permissions to discount, which would have been unnecessary had Boldero and Co. had the right to discount; and the concealment of a discount, as if they considered it a breach of trust: in the York case he noticed an instance of a permission to discount to the amount of 7000*l*., if necessary; and in the Leeds and Thirsk case, he observed, upon the permission to discount and negotiate for limited purposes, that that gave no power beyond, but implied that the general right, subject only to that permission, was in the country bank; the power was to discount for the purposes not of the London but of the country bank.

Ex parte Twogood (Aug. 1812.) 19 Vcs. 229. Crossley bargained with Messrs. Lee that he should deposit with them bills

at long dates, which they might receive when due or dispose of in their business as they should think fit, and that they should accept Crossley's bills at three months. In 1807 Crossley became bankrupt: at that time he owed the Lees 800*l.*, and they had in their possession bills they had received from him to the amount of 7999*l.*; and whether the sums they afterwards received on the bills should be deducted from the proof they had made of the 800*l.* was the question. Crossley's indorsement was upon each bill. *Ld. Eldon C.*, held that their right depended upon the terms on which they took the bills: if they took them as mere agents for Crossley, to apply the produce to his use and not otherwise, the deduction ought to be made; but if they took them as ordinary indorseees, to apply the produce, if they thought fit, to their own purposes, it was otherwise: he decided that they took as ordinary indorseees, and dismissed the petition.

Ex parte Buchanan, re Kensington (Aug. 1812.), 1 *Rosc.* 280. *Kensington and Co.* were the London bankers of the Glasgow bank, and upon the bankruptcy of the former the Glasgow bank petitioned to have certain short bills which were in the hands of *Kensington and Co.* delivered up; the Glasgow bank undertaking to leave with *Kensington and Co.*'s estate bills sufficient to meet the acceptances upon which it was liable on the petitioners' account. *Ld. Eldon C.* said, the petitioners must give security that the bills they left should be paid when due, and made the order.

Ex parte Harford, 2 *Rose*, 162. (Mich. 1814). *Whitehead and Co.*, London bankers, having become bankrupt, their country correspondents petitioned to have their short bills delivered up, they indemnifying the bankrupts' estate against its liability for the petitioners: and the right was considered so indisputable, that two orders were made by consent; one, in *ex parte Harford*, that the provisional assignee should retain the cash balance and the cash received on the short bills paid, together with a sufficient number of the other short bills to cover *Whitehead and Co.*'s acceptances, and that he should deliver over to *Harford and Co.* the residue of the short bills, notes, and securities; the cash and notes retained to be given up, as *Harford and Co.* produced the acceptances cancelled: the other order was, "The provisional assignee consents that all the bills, &c.

shall be delivered up, upon the petitioner leaving such sum as, together with the cash balance, equals the acceptances outstanding."

Ex parte Armitstead, 2 Glyn. & Ja. 371. In March, 1822, A. began to keep cash with the Lancaster bank, and he paid in, from time to time, short bills: these bills were always, on the day they were paid in, entered as cash both in his pass-book and in the books of the bank; but it did not appear that he ever drew against them until they became due; nor that he ever exhausted what, independently of these bills, was his cash balance. In December, 1825, he paid in two bills not then due: the Lancaster bank immediately indorsed them to Barclay and Co., their London bankers, and before they became due became bankrupt. Barclay and Co. received the amount; but Barclay and Co. having security from the Lancaster house to the amount of more than the money the Lancaster house owed them, A. petitioned to come in upon that security; upon the principle that, as between him and the Lancaster bank, the bills belonged to him, and therefore it was by his money that the claim of Barclay and Co. upon such security was pro tanto diminished. *Ld. Lyndhurst C.*, after time to consider, thought the bills continued his, and granted the petition.

Thompson v. Giles, Mason v. Giles, 2 Barn. & Cr. 422. Plaintiffs banked with Worswick and Co. of Lancaster: Worswick and Co. entered all the bills plaintiffs paid in, if Worswick and Co. approved of them, on the credit side of plaintiffs' account, and carried the amount into the cash column thus, "December 10. Bills 680*l.*:" plaintiffs either indorsed them, or, if they did not like their names to appear, guaranteed the payment of them to Worswick and Co. Worswick and Co. kept an interest account, in which plaintiffs were debited with the interest until the bills should become due. Worswick and Co., and the other bankers in the neighbourhood, used to pass into circulation many of the bills their customers paid in, and in one case plaintiffs knew it. Worswick and Co. became bankrupt, having bills in their hands, paid in by Thompson and Co. to the amount of 25,000*l.*, and by Mason and Co. to the amount of 1483*l.*, and the assignees insisted on having these bills. Thompson and Co., and Mason and Co. brought trover; and, on a case reserved, the assignees insisted that the course of dealing be-

Whether the customers were common individuals (49), or country bankers (50);

And whether the banker were paid for his agency (51) or not.

But there may be such a course of dealing between the banker and his customer as to show, that the bills are considered by both parties to belong not to the customer but to the banker (52): it is, however, for the assignees to prove such a course of dealing; — the presumption is the other way.

tween Worswick and Co. and plaintiffs, evinced by the entries in Worswick and Co.'s books, and the usage, proved that the bargain between plaintiffs and Worswick and Co. was, that the bills should, as soon as paid in, become the property of Worswick and Co., and that the plaintiffs should at the same time be creditors *pro tanto* in cash: but the court held clearly, that the facts warranted no such inference; that a bargain to such an effect would be so prejudicial to the customer that no banker could reasonably propose, nor any customer reasonably accede to it; and that the loss, in case of theft or fire, would have been shifted in a way that never could have been intended; that the fair inference from the mode of keeping the accounts was no more than this, that it was intended to show the customer how far the bank entitled him to draw, and to justify the banker in using the bills paid in, not for his own purposes, but for the purposes of the customer. *Postea* to the plaintiffs.

(49) *Zinck v. Walker*, *Giles v. Perkins*, *Ex parte Sargeant*, *Ex parte Twogood*, *Ex parte Armitstead*, *Thompson v. Giles*, *suprà*.

(50) *Ex parte Rowton*, *Ex parte the Hull*, *Wakefield*, and other Banks, *re Boldero*, *Ex parte Buchannan*, *Ex parte Harford*, *suprà*.

(51) *Ex parte the Wakefield Bank*, *re Boldero*, *suprà*.

(52) *Ex parte Sargeant*, *antè*, p. 146.

The accounts from time to time rendered to the customer are evidence to show the course of dealing between the parties. (53)

Entries in the banker's books are not; unless it appear that the customer had full knowledge of what the books contain. (54)

But such entries, though never communicated to the customer, are evidence against the banker (54); and so are declarations made by him before he became bankrupt. (55)

If it be the course of dealing that the bills, as soon as they are paid in, are to become the property of the banker; that he has a right to apply them to his own purposes; that in case of loss he is to be the sufferer; and that they are to be treated between the parties as cash; they belong to the assignees.

But, if it be the course of dealing that they are to continue the property of the customer whilst they are in the banker's hands; that they are to be applicable to the purposes of the customer only; that the customer would have a right to complain if the banker used them for himself; and that in case of loss it would fall not upon the banker but upon him; they belong to the customer.

Applications by the customer to the banker not to put into circulation particular bills are evidence

(53) *Ex parte the country Banks*, re Boldero, *suprà*, p. 146.

(54) 1 *Rose*, 252.

(55) *Ex parte the Hull Bank*, re Boldero, *suprà*.

that the property is in the banker (56); because, otherwise, it would be a breach of duty to put them into circulation.

Applications by the banker for leave to use particular bills for his own purposes raise a contrary presumption; for, why should leave be asked for what a man has a right to do without leave?

Entering the bills as soon as they are received as cash with a deduction for the interest, for the time they have to run, is a circumstance to show they are immediately considered as the property of the banker (57); but it is not conclusive. (58)

Entering them without a deduction of discount

(56) *Ex parte Thompson*, 1 Mont. & M'A., 102: in March, 1822, Thompson began to deal with the Lancaster Bank. He scarcely ever paid in any thing but short bills: they were entered in the bank and pass books as cash, deducting interest till they became due: he was in the constant habit of drawing against them as cash, and in some instances had requested that particular bills might not be put in circulation, because it would show who his correspondents were: the bills he had paid in being in the hands of Barclay and Co. when the Lancaster Bank failed, he petitioned as Armitstead had done (*ex parte Armitstead*, *antè*, p. 149.): but Shadwell V. C. at the hearing thought it clear, from the course of dealing and the directions not to circulate particular bills, that there was a mutual understanding that the short bills were at once to be treated as cash, and that they, therefore, became the property of the Lancaster Bank as soon as they were paid in: the petition was dismissed with costs.

(57) See 2 Barn. & Cr. 433. per Holroyd J.

(58) *Ex parte Sargeant*, *antè*, p. 146.

is a circumstance to show the contrary (59); especially if they be entered, not as cash, but as bills. (59)

The customer's indorsing them, where his indorsement is not necessary to enable the banker to get them paid, is a circumstance tending to show that they become the property of the banker as soon as they are remitted (60); but it is not conclusive. (60)

Where a customer never draws against short bills, it may be considered he does not look upon them as cash: where he is in the constant habit of doing so (61), the contrary is to be inferred.

If a customer who has a drawing account with a banker deposit with him undue bills to indemnify the banker against his acceptances, the holders of the bills so drawn and accepted have no right to have such undue bills applied in payment of the bills they hold; yet, if both the customer and banker become bankrupt, and the state of accounts between them be such that the banker is entitled to look to the undue bills to indemnify him against all or any part of his acceptances, the produce of such undue bills will be applied in payment of the banker's acceptances to the extent to which the

(59) *Thompson v. Giles*, antè, p. 149.

(60) *Ex parte Twogood*, antè, p. 147.

(61) *Ex parte Thompson*, antè, p. 152.

banker is entitled to be so indemnified (62): but no further. (63)

(62) *Ex parte Waring*, 2 Rose, 182. 19 Ves. 345. (August, 1814; April, 1815). Bracken and Co. drew upon Brickwood and Co., and remitted to them cash and bills to cover their liability: 7 July, 1810, Brickwood and Co. became bankrupt, being under acceptances for Bracken and Co. to the amount of 24,000*l.*, and having cash of theirs 6,766*l.*, and in short bills 21,643*l.* Bracken and Co. became bankrupt in August, 1810, and their assignees obtained an order that Brickwood's assignees should keep distinct accounts of the general estate of Brickwood and Co., and of the proceeds of the short bills, and that they should pay to Bracken's assignees the surplus of those proceeds, after paying the dividends to the holders of the bills drawn by Bracken and Co., and accepted by Brickwood and Co. The holders of those bills presented a counter-petition, that the proceeds of the short bills should be applied to their demands, on the ground that they were deposited specifically to pay those demands. Lord Eldon C. thought it clear that the holders were not entitled to what they asked on the ground on which they asked it, viz. that Brickwood and Co. held the short bills in trust for them; but, it being in his mind clear, that Bracken and Co. would have been entitled to a restoration of the short bills upon relieving Brickwood and Co. from their acceptances, though not otherwise, the true way of arranging the equities between the two estates was, to appropriate the short bills to the payment of those acceptances: the holders of those acceptances obtaining this preference, not upon the principle of a direct demand, nor upon the principle of right in them, but because it was the proper mode of doing justice between the two estates.

(63) *Ex parte Parr*, Buck, 191. (12 March, 1818). Leigh had a drawing account with Brickwood and Co.; Brickwood and Co., at the time of their bankruptcy in 1810, were under acceptances for Leigh to the amount of 20,784*l.*, and had short bills of Leigh's in their hands: in 1811, Leigh became bankrupt. Parr, who held the bills for 20,784*l.*, petitioned to have the short bills applied to his demand; this was opposed, on the ground

Thus, if the banker be under acceptances for the drawer to the extent of 20,000*l.*, and have undue bills of the customer's to that amount, but be indebted to the customer 10,000*l.*, the undue bills will be applied to those acceptances to the extent of 10,000*l.* only; because, the banker would have no claim upon them except to that amount.

Where a bill or note is made payable to a person who is merely an agent in the transaction, if he indorse generally, without using words to prevent his liability, he will be bound personally. (64)

If an executor or administrator indorse, he binds himself personally, not the assets in his hands. (65)

If the holder of a note appoint the maker his executor, and the executor prove his will, the note is to be considered as discharged; so that if the executor afterwards indorse over the note, such indorsement will transfer no right of suit to the indorsee. (66)

that Brickwood and Co. were indebted to Leigh, exclusively of the short bills, in 21,212*l.*, and, therefore, had no claim upon those bills, and there was no equity to be arranged between the two estates: Plumer V. C. was of that opinion; } but, it being doubtful whether Brickwood and Co. were indebted to Leigh in the 21,212*l.*, he referred it to the master to enquire, whether Brickwood and Co. had, at the time of their bankruptcy, any and what lien upon the short bills.

(64) See *Goupy v. Harden*, *antè*, p. 71.

(65) See *King v. Thom*, *antè*, p. 74.

(66) *Freakley v. Fox*, 9 Barn. & Cr. 130. Defendant was sued as maker of a note payable to Reeves or order on demand. The first count stated that Reeves made his will and appointed defendant, E. C., C. C., since deceased, and E. A. executors,

So, if the holder appoint the maker one of several executors, and the maker join in proving the will, and afterwards concur in indorsing away the note, the indorsee will have no remedy against him upon the note. (66)

And an averment, that the testator did not mean to forgive the debt, and that defendant recognised and confirmed the note as subsisting, is inadmissible; for the law considers it as discharged when the maker has proved the will, and looks upon it as paid by the executor to himself. (66)

Sect. 3. — The transfer of a bill or note may be made either before the expiration of the time

and died; that the executors proved, C. C. died, and defendant, E. C. and E. A. indorsed the note to plaintiff: the second note stated the indorsement by E. A. only: defendant pleaded the will, Reeves's death, and his proving the will: plaintiff replied, that Reeves made E. C. and C. C. residuary legatees; that he did not by his will forgive the debt; that he did not by making defendant an executor release or intend to release the debt; and that defendant recognised and confirmed the note as valid after Reeves died, and before the indorsements to plaintiff; that defendant paid interest upon it to his co-executors, and afterwards joined in indorsing the note in the first count. Defendant demurred; and on argument and time to consider, the court held, that upon defendant's proving the will as executor, the note was to be considered as discharged, so that his indorsement could not set it up again, and make it a binding instrument: it was to be looked upon as paid by defendant to himself, and assets in his hands. Judgment for defendant.

limited for its payment, or, unless (67) the sum payable thereby be under five pounds (68), afterwards.

But a man who takes a bill after it is due, takes it subject to all the objections and equities to which it was liable in the hands of the person from whom he takes it. (69)

(67) Vide 17 G. 3. c. 30. s. 1. *antè*, p. 12.

(68) *Dehers v. Harriott*, 1 Show. 163. A bill was indorsed to the plaintiff after it was due, and he had judgment without any objection on this ground.

Mutford v. Walcott, Lord Raym. 575. Holt C. J. said, he remembered a case where a bill was negotiated after the day of payment, and he had all the eminent merchants in London with him at his chambers, and they all held it to be very common, and usual, and a very good practice.

(69) *Taylor v. Mather*, B. R. Pasch. 27 Geo. 3. 3 Term Rep. 83 n. Indorsee of a note against the maker. It appeared to have been indorsed after it was due, and there were many circumstances which led the Court and jury to conclude it had been unfairly obtained, upon which the jury found for the defendant. A new trial was refused upon the merits, and per Buller J. "It has never been determined that a bill or note is not negotiable after it is due, but if there are any circumstances of fraud in the transaction, and it is indorsed to the plaintiff after it is due, I have always left it to the jury upon the slightest circumstance to presume that the indorsee was acquainted with the fraud." The rest of the Court concurred in this opinion.

Brown v. Davies, 3 Term Rep. 80. Davies drew a note payable to Sandall or order; Sandall indorsed it to Taddy, and he had it presented, and noted for nonpayment. Davies then paid the money to Sandall, and he took up the note from Taddy, but instead of returning the note to Davies, indorsed it to Brown. Brown thereupon sued Davies, and on Davies offering to prove these facts, Lord Kenyon thought they would not amount to a defence, unless it could be proved that Brown knew them

And if such person were agent only, to receive the money for his principal, the person to whom he passes it will be accountable to the principal for whatever he receives thereon, whether it be money,

Or a new bill. (70)

And an order from the principal to prohibit payment of such new bill, will be a bar to any action at the suit of the person to whom the first bill was passed. (70)

when he took the note, and he rejected the evidence : but upon a rule nisi for a new trial, and cause shewn, Lord Kenyon said, he thought there ought to be further enquiry ; it did not strike him at the trial that the note had been noted before Brown took it, and that that circumstance ought to have awakened Brown's suspicion. Ashhurst and Buller Js. thought that the party taking a note after it was due was to be considered as taking it on the credit of the person from whom he received it, and that whatever would be a defence against the giver would be a defence against the receiver ; upon which Lord Kenyon said, he agreed with that, if the note appeared on the face of it to have been dishonoured, or if knowledge could be brought home to the indorsee that it had been so ; but otherwise he was not prepared to go that length. (See vide post, *Boehm v. Sterling*, n. (78), p. 164., where he expresses an opinion, that it made no difference whether the bill appeared upon the face of it to have been dishonoured, or not.) Grose J. said, if collusion could be proved between the defendant and Sandall, the defendant would not be entitled to insist on the objection, but as the case then stood he thought there ought to be a new trial. Rule absolute.

(70) *Lee v. Zagury*, 8 Taunt. 114. Sebag had a bill accepted by defendant, over due ; he sent it to White, that White's correspondent might get the amount for Sebag : White's correspondent indorsed it to Vidal for a debt he owed Vidal, and Vidal not being able to obtain the money, got a new bill from defend-

It has been held however, that a man who takes a bill after it is due will stand in the same situation as if he had taken it before, if he held it for value before it was due, and it be re-delivered to him for the same value afterwards (71);

As, if a banker's customer deposit a bill with him for value before it be due, get it from him again before it is due, and again deposit it with him for value after it is dishonoured. (71)

ant for the amount, and indorsed it to plaintiffs as his agents. Sebag gave defendant notice not to pay this bill, and an action being brought thereon, the defence was, that plaintiffs were mere agents for Vidal; and that as Vidal took the first bill after it was due, he stood in the place of White; and as White would have been accountable to Sebag for whatever he received in respect of the first bill, Vidal was equally so accountable; and then the second bill was, as against Vidal, the property of Sebag, and Sebag's prohibition to defendant not to pay the second bill, was an answer to the action upon it. Gibbs C. J. was of this opinion, and left it to the jury whether plaintiffs were not mere agents to Vidal, and whether the second bill was not the property of Sebag. The jury found for defendants; and on rule nisi to enter verdict for plaintiffs, the other judges agreed with Gibbs C. J.: rule discharged.

(71) *Bosanquet v. Dudman*, 1 Stark. 1. Clarkson and Co. banked with plaintiffs, and deposited a bill with them as a security for their engagements on behalf of Clarkson and Co., but before it became due Clarkson and Co. got it back from plaintiffs. After it was dishonoured Clarkson and Co. re-delivered it to plaintiffs, but in the interim Clarkson and Co. bought a ship from the drawer, for whose accommodation defendants had accepted, and agreed to give up this bill in part payment, so that Clarkson and Co. could not have sued upon the bill; but Lord Ellenborough held, that when the bill was returned to plaintiffs they returned to their former right, and were not

So, if a customer being indebted to his banker deposit with him bills as a security on account, though the bills were accepted for the customer's accommodation, and though at the time when they afterwards become due, the balance of accounts between the customer and the banker were in favour of the customer; yet, if the bills be suffered to remain in the banker's hands until the balance turns in his favour, the banker will hold as in his former right, and will be entitled to recover against the acceptor. (72)

affected by what Clarkson and Co. had done: verdict for plaintiffs.

(72) *Attwood v. Crowdie*, 1 Stark. 483. Defendants lent their acceptances, for the accommodation of Mattingley and Co., to two bills at three and four months after date, payable to Mattingley and Co., or order; Mattingley and Co. having been pressed by their bankers for security, sent them these and other bills on account: at the time these bills became due, and at several periods afterwards, the balance between Mattingley and Co. and the bankers was in favour of Mattingley and Co.; but Mattingley and Co. failed, and the balance then was the other way: the bankers sued defendants upon these acceptances; defendants insisted that as the balances were against the bankers when these bills became due, and afterwards, these bills must be considered as satisfied, or at least that plaintiffs must stand as if the bills had been indorsed to them after they became due: but Lord Ellenborough held, that as the bills were sent *on account*, which must have meant the floating account, though there were periods at which the plaintiffs had no claim upon them, and they might have been demanded back, yet as they were suffered to remain, the plaintiffs' claim revested, when by fresh advances the balance turned in their favour — and plaintiffs had a verdict.

So, if an indorsee for value indorse away the bill or note, and it be returned to him after it becomes due, and he pay the amount, he will be entitled to recover the full amount from the antecedent parties, though some of those parties had lodged securities with the person who held the bill when it became due, and part of the amount had been paid on those securities; (73)

At least, if he did not know when he took up the bill, that such securities had been so lodged. (73)

And though a man, who takes a bill after it is due, takes it subject to the objections to which it was liable in the hands of the person from whom he took it, he is not subjected to every description of evidence to which that person would be liable; (74) therefore, though the entries in that person's

(73) *Buzzard v. Flecknoe*, 1 Stark. 333. Plaintiffs indorsed two bills to Lord; Lord held them three months after they fell due, and then called on plaintiffs, who took them up. In the interim Lord had received another bill from the drawer as a collateral security, but plaintiffs did not appear to have known that fact; that bill was afterwards satisfied, and plaintiffs having brought this action against the acceptor, he insisted that the amount of that bill ought to be deducted on the ground that plaintiffs stood in the situation of Lord; but Lord Ellenborough thought otherwise, because plaintiffs' title did not first commence after the bill became due, but was referable to their prior holding; had they been discharged from the bills, they might have stood in the situation of new holders. Verdict for the whole amount.

(74) *Collenridge v. Farquharson*, 1 Stark. 259. In an action by indorsee against indorser, it appeared that one Powell was

books, if made at the time of passing the bill and accompanying that act, might be evidence against him, yet entries which cannot be proved to have been so made, and might have been made afterwards, are not. (74)

And though a bill be indorsed over *before* the time appointed for its payment, yet if acceptance have been previously refused, the indorsee (75) will

holder when the bill became due, and that he had afterwards indorsed the bill to plaintiff, there being accounts between defendant and Powell, which would have regulated the extent to which Powell could have recovered. Defendant offered in evidence Powell's books, to show how those accounts stood, and insisted that whatever would have been evidence against Powell would be evidence against plaintiff; but Lord Ellenborough held, that though an entry by Powell at the time and accompanying the act would have been evidence, an entry not accompanying the act, and which might have been made afterwards for the very purpose of being used in evidence, was not, and the plaintiff had a verdict.

(75) *Crossley v. Ham*, 13 East's Rep. 498. The defendant for the accommodation of Clark, indorsed two bills drawn by Clark in America, upon Dickinson and Co. in London, for 450*l.* each, in favour of the defendant, dated 10th of February, 1804, and payable 60 days after sight. These bills were paid over by Clark to Parry, in February, 1804. The defendant, Parry and Clark, then, and until after the 14th of April, 1808, resided in America. On the 1st of March, Parry indorsed and remitted the bills to his agents in London, with directions to make a payment to the plaintiff, to whom he then, and still, was indebted. On the 26th of April, the bills were presented for acceptance, dishonoured, and protested for non-acceptance; and notice thereof was given to the defendant. The plaintiff having been advised of the remittance by a letter from Parry, dated on the 12th of April, applied to Parry's agents for 450*l.*; and on the 6th of June they delivered one of the bills to the plaintiff, ap-

be liable to the same objections as might have been taken against his indorser, if he take the bill with a knowledge of its having been dishonoured ;

And if the bill be noted for non-acceptance, he must be taken to have this knowledge.

But if he take the bill without this knowledge, and be a *bonâ fide* holder for a valuable consideration, he will not be liable to such objections. (76)

prising him of its dishonour, and that therefore he took the bill, subject to all its infirmities. The bill became due on the 29th of June, and payment being refused, this action was brought. The defendant, however, produced at the trial an instrument signed by Parry, dated 14th of April, 1804, by which he agreed that the defendant, on paying one of the bills in London, should be exonerated from paying the other ; and the defendant proved his having, on the 2d of July, paid one of the bills, which then remained in the hands of Parry's agents, who delivered it upon payment. This agreement was, until the 2d of July, unknown to the plaintiff and Parry's agents. A verdict was found for the plaintiff, and a case reserved for the opinion of the Court. The Court (Le Blanc J. *absente*) held that the plaintiff, having taken this bill after its dishonour, had taken it with all its infirmities, and subject therefore to the agreement between Parry and the defendant. *Postea* to the defendant.

(76) *Dunn v. O'Keefe* (6 Taunt. 305.), 5 M. & S. 282. Action on bill drawn by defendants on Ricketts and Co. payable to Sinclair or order, and by him indorsed to plaintiff ; breach for non-acceptance ; plea, that before indorsement to plaintiff, Sinclair presented it for acceptance, that acceptance was refused, and notice thereof not given to defendants ; replication, that it was not so presented, and verdict *indè* that it was, but non obstante *veredicto*, judgment for plaintiff. On error it was urged that the presentment by Sinclair, and want of notice *indè*, discharged defendants entirely from the bill ; but the Court held, it did not discharge him against an innocent indorsee, who took

And if the holder's immediate indorser might have recovered upon a bill or note, it is no defence to an action by the holder that an (77) antecedent party would have been precluded from recovering upon it.

The rule as to bills and notes when taken after they are due, is in general applicable also to (78) checks upon bankers.

But it will not apply to such checks where they appear to have been issued long after their date. (78)

the bill for a valuable consideration before the time appointed for its payment ; and as it was not alleged in the plea that plaintiff knew of the prior dishonour, or that it was indorsed to him after it was due, or that he did not give value for it, judgment affirmed.

(77) *Chalmers v. Lanion*, 1 Campb. N. P. C. 383. To an action by the indorsees against the acceptor of a bill, one ground of defence was, that the bill had been accepted for a debt contracted in a smuggling transaction, and that though it had been indorsed for value, before it became due, to a bona fide holder, yet that it had been indorsed by him to the plaintiffs after it was due ; and it was contended that having been so indorsed to the plaintiffs, it was competent to the defendant to set up the illegality of the consideration as a defence, in like manner as if the action had been brought by the payee. But Lord Ellenborough held, that if the plaintiff's indorser might have maintained an action upon the bill, the circumstance of the indorsement to them having been made after the bill had become due, was insufficient to let in the proposed defence. And the Court of King's Bench concurred in opinion with his Lordship.

(78) *Boehm v. Sterling*, 7 Term Rep. 423. Muilman lent the defendant his acceptance for 244*l.* 1*s.* at three months, and the defendant gave Muilman a check upon his banker for the amount, dated 17th of Feb. 1796. The year was perhaps intended for 1797. On the 20th of January, 1797, Muilman

A bill or note cannot be (79) indorsed or negotiated after it has been once paid, if such indorse-

gave this check to the plaintiff in payment of an old debt. Muilman died before his acceptance became due, and the defendant was obliged to take it up. In an action upon the check, the defendant urged that Muilman could not have sued him upon this check, and that therefore the plaintiff could not, because he took it so many months after it was dated. Lord Kenyon left it to the jury whether the plaintiff took it *bonâ fide*, and without knowing the circumstances under which Muilman held it. They found for the plaintiff. And on a rule nisi for a new trial, and cause shown, Lord Kenyon admitted that it was to be considered as a rule that the person who takes a bill after it is due, is subject to the same equity as the party from whom he took it, though the bill did not appear upon the face of it to have been dishonoured; and he thought there was no distinction in this respect between checks upon bankers and bills of exchange; but as the defendant had not issued this check until nine months after it was dated, he thought it was not competent to him to object to the time when the plaintiff took it; the other Judges agreed that the rule mentioned by Lord Kenyon was to be considered as settled, but for the reasons given by Lord Kenyon that it did not bear upon this case. Rule discharged.

R. acc. *Tinson v. Francis*, 1 Campb. N.P.C. 19.

(79) *Beck v. Robley*, B.R. Tr. 14 G. 3. cited 1 H. Blackst. 89 n. Brown drew a bill upon Robley, which Robley accepted, payable to Hodgson or order; Robley did not pay it when it was presented, upon which Brown took it up; Brown afterwards indorsed it to Beck, and Beck brought an action upon it against Robley; but the jury thought that when Brown took up the bill, its negotiability ceased, and found for the defendant; and on a rule nisi for a new trial, the Court thought the jury right, and Lord Mansfield said, "When a draft is given payable to A. or order, the purpose is, that it shall be paid to A. or order; and when it comes back unpaid, and is taken up by the drawer, it ceases to be a bill. If it were negotiable here, Hodgson would be liable, for which there is no colour."

ment or negotiation would make any of the parties liable who would otherwise be discharged.

But an indorser who pays a bill, may indorse or negotiate it, because his indorsement or negotiation will make no person liable but himself, and those whom he might sue. (80)

And if a bill or note be paid before it is due, and nothing done upon it to mark such payment, an indorsement afterwards, before the time it would have become due, will give the indorsee, if he take it *bonâ fide* and for a valuable consideration, the same right as if there had been no such payment. (81)

(80) *Callow v. Lawrence*, 3 M. & S. 95. Pywell drew on defendant, payable to his own order, and indorsed to Taylor; defendant accepted the bill, but did not pay it; Pywell took it up, and indorsed it to plaintiff. It was urged, that after Pywell had once paid it he could not indorse it, its negotiability was at an end; but on cause shown the Court were clear that Pywell's payment did not terminate its negotiability, because his indorsement would make no person liable but himself and defendant, and defendant had never been discharged. Rule discharged.

Hubbard v. Jackson, 4 Bingh. 390. In an action in 1827, against the acceptor of a bill due in 1821, it appeared that Melville, the drawer, had been sued upon it in 1821, and forced to pay it, and that about a year and a half afterwards he indorsed it to plaintiff. Plaintiff had a verdict; and upon motion for nonsuit or new trial on the ground that Melville had no right to indorse it over after it was overdue and paid, the Court held that as his indorsement would give no right of action against any of the parties to the bill except himself and the acceptor, and as nothing had occurred to discharge the acceptor, the indorsement was valid, and the action maintainable. Rule refused.

(81) *Burrige v. Manners*, 3 Campb. 194. Four days before note became due, some person went to the banker's where it

If a (82) man indorse a bill or note before the sum or time of payment be mentioned therein, he

lay, and paid it, and carried it away ; it was not cancelled, nor any minute made upon it to denote such payment ; within the four days it was indorsed *bonâ fide*, and for valuable consideration, to plaintiff, and in an action by him against the payee this payment was relied on, and it was urged that after payment it could not be negotiated ; *sed per* Lord Ellenborough, “ that “ means payment in due course, not payment by anticipation ; “ had the note been due before plaintiff took it, he would have “ taken it with all its infirmities, but here was nothing to awaken “ his suspicion ; this payment does not extinguish it more than “ discounting would ; whilst its time is running, it remains negotiable.” Verdict for plaintiff.

(82) *Russel v. Langstaffe*, Dougl. 514. The defendant, to accommodate Galley, indorsed his name on five copper-plate checks, made in the form of promissory notes, but in blank, without any sums, dates, or times of payment being mentioned therein, and delivered them to Galley ; Galley filled them up as he thought fit, and the plaintiff discounted them ; the plaintiff knew the notes were blank at the time of the indorsement ; Galley not paying them when they became due, the plaintiff brought this action. Holtiam B., before whom the cause was tried, was of opinion, that as the notes were incomplete when the defendant indorsed them, no subsequent act of Galley could make them otherwise, because that would alter the effect of the defendant's indorsement, and he accordingly directed a verdict for the defendant ; but upon an application for a new trial, and cause shown, Mr. Wallace, the attorney-general, gave up the point, though Mr. Lee afterwards argued it ; and Lord Mansfield said, “ Nothing is so clear as the point ; the indorsement “ on a blank note is a letter of credit for an indefinite sum ; the “ defendant said, Trust Galley to any amount, and I will be his “ security ; it does not lie in his mouth to say, the indorsements “ were not regular.” A new trial was accordingly granted ; and a verdict having been found for the plaintiff in a similar action before Lord Mansfield, the defendant submitted in this, without going to a second trial.

will be precluded from saying that his indorsement was prior to the completion or issuing of the bill or note: and this, though the holder knew when he took it in what state the bill was at the time of the indorsement.

And if a man indorse a bill or note with blanks for sum and date, and die before they are filled up, the person filling them up can make no objection on account of such previous death. (83)

And if a bill or note be post-dated (as in most cases it (84) may be) an indorsement before the date (85) will entitle the indorsee to sue the drawer

(83) *Usher v. Dauncey*, 4 Campb. 97. F. D. and three others were partners, and used to draw bills, with blanks for sums and date, to raise money. F. D. drew one 28th February to his own order, and indorsed it in blank, and died 15th March. 22d April the clerk to the surviving partners inserted as the date, 27th February, and as the sum, 1574*l.*; and an agent of theirs got it discounted: in an action thereon against the surviving partners, it was urged, that F. D.'s death countermanded all authority in the clerk to fill up a bill with his name to it, and that the bill was therefore void: but Lord Ellenborough thought the clerk's authority emanated from all the partners, and that when he filled up the bill on account of their survivors and for their use, he acted as their agent and bound them, and that the case was within the principles of *Russel v. Langstaffe*. The plaintiff had a verdict, and the Court of King's Bench refused to set it aside.

(84) *Sec antè*, p. 25.

(85) *Passmore v. North*, 13 East's Rep. 517. The defendant, on the 4th of May, 1810, drew a bill for 200*l.* on Brook and Co., dated the 11th of May, 1810, payable to Totty or order, sixty-five days after date. On the 5th of May, Totty indorsed this bill to the plaintiff for a valuable consideration; and on the same day died. After the 4th, and before the 11th of May,

or maker, although the indorser die before the date of the bill or note.

Upon the transfer of a bill drawn in sets, each part must be delivered to the person in whose favour the transfer is made; otherwise the same inconveniences may follow, which would ensue upon a neglect to deliver each of them to the payee.

The indorsement of a bill or note, implies an undertaking from the indorser to the person in whose favour it is made, and to every other person to whom the bill or note may afterwards be transferred, exactly similar to that which is implied by drawing a bill, except that in the case of a note, the stipulations with respect to the drawer's responsibility and undertaking do not apply; and a transfer by delivery only, if made on account of an antecedent debt, implies a similar undertaking from the person making it, to the person in whose favour it is made.

the defendant received effects of Totty's to the amount of about 130*l.* to answer this bill. On the 12th of May, the defendant advised the drawees, of the bill having been drawn, and of Totty's death, and desired them not to accept or pay the bill. Acceptance and payment were accordingly refused: and this action was brought against the drawer. A verdict was found for the plaintiff, subject to the opinion of the Court of King's Bench, on a case reserved. The Court, after adverting to the 17 G. 3. c. 30. as to bills for less than 5*l.*, and to the 48 G. 3. c. 149. as to post-dating drafts upon bankers, held clearly, that the plaintiff was entitled to recover for the whole amount of the bill; and he had judgment accordingly.

And a transfer by delivery, where the bill or note is sold, may imply that it is a genuine bill. (86)

An indorsement is no warranty that the prior indorsements are genuine. (87)

At least it is not, in the case of a person who has the same means of judging as the indorser, and who uses those means, and judges for himself. (87)

(86) *Jones v. Ryde*, 5 Taunt. 488. 1 Marshall, 157. Plaintiff sold defendant a navy bill as and for a bill of 1800*l.*, which it imported to be: it turned out that the bill was issued for 800*l.* only, and had afterwards been altered. Government paid the 800*l.* only, and plaintiff who had parted with the bill, paid his vendee the 1000*l.* and called upon defendant to reimburse him; defendant refused, and plaintiff sued him: it was urged for defendant, that both parties were equally innocent; but the Court held, that as defendant took upon himself to sell as a bill for 1800*l.* what in fact was a bill for 800*l.*, the consideration pro tanto had failed, and plaintiff was entitled to recover it back. In *Bruce v. Bruce*, 1 Marshall, 165. the same point was decided upon a victualling bill.

(87) *East India Company v. Tritton*, antè, 73.

CAP. VI.

SECT. 1. *Of the Acceptance of Bills or Notes.**By whom. Drawee, p. 172.**————— for Honour, p. 176.**————— one of several Drawees not Partners, p. 180.**————— one of several Partners, p. 180.**————— a Servant, p. 181.**When, p. 181.**On the Bill, p. 182.**Not on the Bill, p. 184.**By keeping or destroying the Bill, p. 191.**Conditional or absolute, p. 195.**According to or varying from the Tenor, p. 199.**————— as to the Place, p. 200.**What Holder may require, p. 201.**Rejection of—what shall be, p. 202.**Alteration of, p. 204.**Revocation of, p. 204.**Waiver of, p. 208.**———— by Indulgence to the Drawer or other Parties,
p. 212.**———— in Cases of Accommodation Acceptances,
p. 213.*

THE doctrine of acceptances applies chiefly to bills; for a note may (1) in general be considered, on comparison with a bill, as accepted when it issues.

But on notes payable a limited time after sight, an acceptance is necessary to fix the time of their becoming due. (2)

(1) D. acc. 2 Bl. Comm. 470.

(2) Vide antè, *Sturdy v. Henderson*, p. 99.

An acceptance is an engagement to pay a bill according to the tenor of the acceptance; and a general acceptance is an engagement to pay according to the tenor of the bill.

This engagement is made by the drawee of the bill or some (3) other person, to the (4) drawer or

(3) *Mutford v. Walcott*, Lord Raym. 575. 12 Mod. 410. Com. 76. per Holt C. J. "If A. draws a bill on B., and B. will not accept, and C. offers to accept for the honour of the drawer, the holder need not acquiesce, but if he does, C. is bound." And per Lord Mansfield and Yates J. in *Pillans v. Van Mierop*, Burr. 1672. 1674., "an acceptance for the honour of the drawer will bind the acceptor."

(4) *Pillans and another v. Van Mierop*, Burr. 1668. White drew on the plaintiffs at Rotterdam for 800*l.*, and proposed to give them credit upon the defendants' house in London; the plaintiffs paid White's bill, and wrote to the defendants to know, "Whether they would accept such bills as they, the plaintiffs, should draw in about a month upon them for 800*l.* on White's credit." The defendants answered, that they would, but, White having failed before the month elapsed, the defendants wrote to the plaintiffs not to draw. The plaintiffs did however draw, [qu. whether plaintiffs had not previously given credit upon the faith of the defendants' answer before the letter not to draw arrived?] and on the defendants' refusal to pay the bills, brought this action. The jury found a verdict for the defendants; but upon an application for a new trial, as upon a verdict against evidence, and two arguments upon it, the Court was unanimous that the defendants' letter was a virtual acceptance of such bills as the plaintiff should draw to the amount of 800*l.* and the rule was made absolute. See *Johnson v. Collings*, post. p. 186.

Pierson v. Dunlop and others, Cowp. 571. M'Lintot drew upon the defendants in favour of Nicholl, and gave Nicholl a navy bill assigned to the defendants as a security till the bill of exchange should be accepted; both bills were sent by Nicholl

some of the other parties ; and might heretofore have been made upon any bill foreign or inland,

to the defendants, who said, the bill of exchange would not be accepted till the navy bill was paid, but they would receive the money on the navy bill ; and they wrote to M^rLintot, saying his bill would receive due honour, but it was drawn too short, being payable before the navy bill : they afterwards received the money on the navy bill, but refused to pay the bill of exchange, upon which this action was brought : the plaintiff obtained a verdict, but the defendants had a rule to show cause why there should not be a new trial, and insisted that the letter to M^rLintot, upon which the jury had in some measure relied, was no acceptance ; but on cause shown, Lord Mansfield said, “ I consider what the defendants did as an acceptance ; it has “ been truly said, as a general rule, that the mere answer of a “ merchant to the drawer of a bill, saying he will duly honour it “ is no acceptance, unless accompanied with circumstances “ which may induce a third person to take the bill by indorse- “ ment. If there are any such circumstances, it may amount “ to an acceptance, though contained in a letter to the drawer ; “ in this case, there is great reason to say, that what the de- “ fendants did was equivalent to an acceptance : there may be “ a conditional as well as an absolute acceptance ; what then “ is the declaration by the defendants, but an undertaking that “ the bill should be accepted when the navy bill was paid ? after- “ wards he writes this letter, which is an admission he looked to “ the navy bill as the fund out of which the bill of exchange “ was to be paid.” A new trial was refused.

Mason v. Hunt, Dougl. 284. 297. Rowland Hunt, in Dominica, wrote a letter to his partner, Thomas Hunt in London, stating that he had agreed that Thomas should accept bills for 3600*l*. upon certain conditions ; it was doubtful whether those conditions had been performed, but at all events it was clear that the obligation created by this letter was waived ; an action was however brought against the Hunts, and after a verdict for the defendants, and an application for a new trial, upon which the Court took time to consider, Lord Mansfield said, “ There is

before the (5) bill was drawn or (6) afterwards, and either verbally (7) or in writing: but now by

“no doubt but an agreement to accept may amount to an acceptance, and it may be couched in such terms as to put a third person in a better situation than the drawer.”

Powell v. Monnier, 1 Atk. 611. Newburgh drew upon Monnier for 50*l.* and sent him a letter of advice, and Monnier wrote for answer that the bill should “be duly honoured and placed to Newburgh’s debit.” A bill in Chancery was afterwards filed against Monnier’s executrix, upon the ground that this letter amounted to an acceptance; and Lord Hardwicke thought it clear that it did, and decreed payment. (See *Wynne v. Raikes*, post. p. 187. n. (36).)

(5) Vide *Pillans v. Van Mirop*, and *Mason v. Hunt*, antè, pp. 172, 173. But see also *Johnson v. Collings*, post. p. 186.

(6) Vide *Powell v. Monnier*, *suprà*.

(7) *Cox v. Coleman*, M. 6 G. 2. cited *arguendo* Ann. 75. A foreign bill drawn on defendant was protested for non-acceptance and returned, and afterwards defendant told the plaintiff, “If the bill comes back, I will pay it;” and this was held a good acceptance.

Lumley v. Palmer, Str. 1000. Ann. 74. In an action against the defendant as acceptor of a bill, the acceptance appeared to be by parol only, which Lord Hardwicke C. J. ruled to be sufficient; but Eyre C. J. of Common Pleas, having ruled it otherwise in *Rex v. Meggott*, H. 7 G. 2. because of the proviso in 3 & 4 Ann. c. 9. s. 5. “that no acceptance of any inland bill shall be sufficient to charge any person whatsoever, unless the same be under-written or indorsed in writing thereupon,” an application was made for a new trial, and the Court, to settle the point, ordered it to be argued; upon the argument the Court held Lord Hardwicke’s direction right, on the ground that the statute of Anne was intended to give a holder additional remedies, not to deprive him of any he before had; and Eyre C. J. waived his opinion, and agreed with the Court of King’s Bench; and this determination is referred to and approved of in *Julian v. Shobrooke*, 2 Wils. 9. *Powell v. Monnier*, 1 Atk.

1 & 2 G. 4. c. 78. s. 2., which operates from 1st August, 1821, every acceptance of an inland bill must be in writing upon the bill, or, if there be several parts of the bill, on one of such parts. (8)

An acceptance is also either absolute or (9) conditional, and either according to, or (10) varying from, the tenor of the bill.

612 : and in *Pillans v. Van Mierop*, Burr. 1662, Lord Mansfield says, "A verbal acceptance is binding;" and in *Sproat v. Matthews*, 1 Term. Rep. 182, it was taken for granted by the Court and bar that a parol acceptance was good. See also Str. 817.

(8) By 1 & 2 G. 4. c. 78. s. 2. After 1st August, 1821, no acceptance of any inland bill of exchange shall be sufficient to charge any person, unless such acceptance be in writing on such bill; or, if there be more than one part of such bill, on one of the said parts.

(9) *Smith v. Abbott*, Str. 1152. Defendant accepted a bill "to pay when goods consigned to him were sold;" he sold the goods, and on being sued upon his acceptance, insisted in arrest of judgment that it was not binding, because it was conditional; but the Court, on consideration, held, that though the plaintiff might have refused to take it, and have protested the bill, yet as he did take it, it was binding on the defendant.

Julian v. Shobrooke, 2 Wils. 9. The defendant accepted a bill to pay, "when in cash for the cargo of the ship *Thetis*;" and on being sued, moved in arrest of judgment that a conditional acceptance was not good; but the court held otherwise, and over-ruled the objection,

Pierson v. Dunlop, Cowp. 571. antè, p. 172. An answer that the bill would not be accepted till a navy bill was paid, was held a conditional acceptance, to pay when the navy bill should be discharged.

(10) *Wegersloff v. Keene*, Str. 214. A foreign bill for 127*l.* 18*s.* 4*d.* was drawn on the defendant, and he accepted it to pay 100*l.* part thereof; he was sued upon this acceptance, and on

An acceptance is seldom made, before the bill is drawn, by any other person than the drawee; afterwards, for the purpose either of promoting the negotiation of a bill where the drawee's credit is suspected, or to save the reputation and prevent the suing of some of the parties where the drawee either cannot be found, is not capable of making himself responsible, or refuses acceptance, an acceptance by a stranger is not uncommon; and it is called an acceptance for the honour of the (11) person on whose account it is made, and enures to the benefit of all the parties subsequent to that person.

demurrer to the replication, insisted that a partial acceptance was not good within the custom of merchants; but the Court held otherwise, and judgment was given for the plaintiff.

Walker v. Atwood, 11 Mod. 190. A bill was drawn on the defendant 8th of April, and no time fixed for its payment; it was presented to defendant 18th of April, and he accepted it to pay 8th of September; this being stated in the declaration, the defendant demurred, and insisted that as no time was prescribed for the payment, the bill was payable at sight, and then a promise to pay two or three months after sight was not an acceptance within the custom of merchants; but the Court held it was an acceptance within the custom, and the demurrer was over-ruled.

Petit v. Benson, Comb. 452. A bill was accepted to be paid half in money and half in bills; and the question was, whether there could be a qualification of an acceptance; and it was proved by divers merchants that there might, for he that might refuse the bill totally might accept it in part; but that the holder was not bound to acquiesce in such acceptance.

(11) Vide *Lutw.* 899. *Beawes*, s. 34. 1st ed. p. 418. s. 40. 42. 2d ed. p. 419.

Acceptances for honour are sometimes made on account of the person in possession of the bill at the time they are made, and sometimes on account of the drawer.

Acceptances for honour may be made by the drawee, or any other person. Thus, if a bill be drawn by A. on account of B., and the drawee be unwilling to accept on account of B., he (12) may accept for the honour of A. and on his account.

So the drawee may accept for the honour of an indorser.

And if the drawee refuse acceptance, or if he accept and afterwards abscond, or (13) become bankrupt, any other person may accept for the honour of the drawer or of an indorser.

But after a general acceptance by the drawee, another person (14) cannot make a second ac-

(12) Beawes, s. 33. 2d ed. p. 421. Marius, 21.

(13) See *ex parte Wackerbarth*, 5 Ves. 574. and *infra*, n. (16).

(14) *Jackson v. Hudson*, 2 Camp. N.P.C. 447. Action on a bill drawn by the plaintiff on I. Irving, and accepted by him; and under his acceptance the defendant wrote "accepted, Jos. Hudson. Payable at, &c." The defendant was sued as acceptor. The plaintiff offered to prove that he had had dealings with Irving, and had refused to trust him further, unless the defendant would become his surety; and that the defendant, in order to guaranty Irving's credit, wrote this acceptance on the bill. Lord Ellenborough said, that this was neither an acceptance by the drawee, nor by a person for the honour of the drawer; but that it was a collateral undertaking that the bill should be paid, and ought to have been declared upon as such. Nonsuit.

ceptance in order to guaranty the acceptor's credit.

If, however, such second acceptance be written on the bill, the party for whose benefit it is made (15) may sue the person who made it, as upon a collateral undertaking to guaranty the payment of the bill, if it have the stamp proper for such an undertaking.

A person who accepts for honour, is only liable if the original drawee do not pay. (15)

And to charge such acceptor, there must be a presentment for payment to such original drawee. (15)

It seems, however, that after an acceptance *supra protest* for the honour of one party, there may be a similar acceptance for the honour of another. Beawes, s. 72. 2d ed. p. 422.

(15) *Hoare v. Cazenove*, 16 East, 391. A foreign bill was drawn on Penn & Hanbury; they refused acceptance, and it was protested for non-acceptance. Defendant accepted it for the honour of the first indorsers; but did not pay: *action indè: defence*, that it had not been presented for payment when due, to Penn & Hanbury, nor protested for nonpayment by them: and on case and time to consider, the Court held such presentment and protest essential; because, they considered defendant's acceptance as conditional, if Penn & Hanbury did not pay; and Penn & Hanbury might have funds when the bill became due, though they had none before.

Williams v. Germaine the elder, 7 Barn. & Cr. 468. The declaration stated that George Germaine drew a bill at 30 days, sight, at Sierra Leone, upon Pugh and Redman, London; that Pugh and Redman refused to accept, and it was protested for non-acceptance; that thereupon defendant, to prevent the bill from being sent back and returned, did, under the said protest, accept the said bill in writing, and subscribed the said accept-

And if the acceptor for honour pay, he is (16) entitled to have recourse for repayment to the per-

ance on the said bill, and then and there made the said bill payable at a certain place by the description of No. 6. Union Court, Old Broad Street; that the bill when due was presented at the said place, and payment demanded, but payment was not made, by reason whereof defendant became liable and promised; after judgment by default, rule nisi in arrest of judgment, on the ground that there was no allegation of presentment for payment to Pugh and Redman; and on cause shown, and time to consider, the Court thought themselves bound by Hoare and Cazenove to consider such an allegation essential; and Lord Tenterden intimated a strong opinion, that without that authority he should have been of a similar opinion, on the ground that an acceptance for honour is only an undertaking to pay if the original drawee do not. R. A.

Williams v. Germaine the younger, 7 Barn. & Cr. 463. Michaelmas, 1827. This was an action on the same bill against the drawer, and for want of a similar allegation of a presentment for payment to Pugh and Redman, the judgment was arrested.

N. There was no distinct averment of Pugh and Redman's refusal to accept.

In *Brunetti v. Lewin*, Lutw. 896. The declaration, after setting out the custom, stated the facts as follows:—Valentine in London drew on Abandano at Leghorn, payable to defendant's order. Abandano refused to accept, and the bills were protested for non-acceptance, whereof defendant had notice, and thereupon defendant accepted for the honour of the drawer, and promised to pay "on the return thereof." Plaintiff indorsed the bill, and after several indorsements, it was presented to Abandano for payment, but payment was refused. The bill was protested for nonpayment and returned to plaintiff, whereof defendant had notice, and Defendant had sight of the bill, and promised to pay.

(16) *Beawes*, s. 47. 49. 2d ed. p. 422. and see *ex parte Wackerbarth*, 5 Ves. 574. The acceptor of a bill having become bankrupt, and the holders having protested it for better security

son for whose honour he made the acceptance, and to all other parties who are liable to that person.

An acceptance of this description is not made on a foreign bill until after a (17) protest (either for non-acceptance, or (where the acceptor absconds or becomes bankrupt) for want of better security), and from this circumstance it is called an acceptance *supra protest*.

If a bill be drawn on several partners, an acceptance by one, though in his own name only, will bind (18) all; but if drawn on several persons not connected in partnership, an acceptance by one will bind him, but him (18) only.

If an acceptance by one of several partners be a fraud on the others; or if the one have no authority to bind the others by accepting bills; a person who is (19) privy to such fraud, or who (19) has re-

Christen and Bowen accepted it for the honour of the drawers; and having paid it, now claimed to be entitled to dividends out of the bankrupt's estate. The chancellor said, that he had spoken to persons in trade on the subject, and that the result was, that the person accepting for the honour of the drawer had a right to come upon the acceptor. He said, however, that the justice of the case required that they should go in the first place against the drawer, if the acceptor had no effects, and directed an inquiry to be made whether the original acceptor or Christen and Bowen had effects of the drawer's in hand. [But if the original acceptor were not liable to the drawer, he will not be liable to the acceptor for honour. See *Ex parte Lambert*, 13 Ves. 179.]

(17) *Beawes*, 2d ed. p. 421. *Marius*, p. 21. See *Evans* on Bills of Exchange, p. 35.

(18) See *antè*, p. 52. note (22).

(19) See *antè*, c. 2. p. 56, 57.

ceived notice of such want of authority, cannot, by taking such acceptance, acquire a right to sue the partnership.

On a bill drawn upon a man by the description of "servant," a general acceptance will (20) bind him personally.

An acceptance after the bill is drawn may be made even after (21) the time appointed for its payment.

In such case an acceptance to pay according to the tenor, will (22) be considered as a general acceptance to pay upon demand.

Upon the acceptance of a bill payable at a given time after sight, if the words of acceptance and the date be in one hand-writing, and the drawee's name under it in the drawee's, the presumption

(20) See *Thomas v. Bishop*, *antè*, p. 71.

(21) *Jackson v. Piggot*, Lord Raym. 364. Salk. 127. Carth. 450. 12 Mod. 212. In an action against the acceptor of a bill, the declaration stated, that it was dated 25th March, 1696, payable one month after date, and that in April, 1697, it was shown to the defendant, and he promised to pay it according to its tenor and effect; after verdict for the plaintiff, it was moved in arrest of judgment, that the promise was void, because as the day of payment was past at the time of the acceptance, it was impossible to pay the bill according to its tenor and effect; but it was answered for the plaintiff, that it amounted to a promise to pay generally; and of that opinion was the court, and they accordingly gave judgment for the plaintiff.

Mutford v. Walcot, Lord Raym. 574. Salk. 129. 12 Mod. 410. Com. 75. is precisely to the same effect.

(22) Vide *Jackson v. Piggot*, and *Mutford v. Walcot*, *suprà*.

is that the words of acceptance and the date were either upon the bill when he signed his name, or put there afterwards with his consent ; because, that is the usual course. (23)

A written acceptance is either made upon the bill or (24) elsewhere.

On a written acceptance by the drawee, his name need not appear ; and any words written by him upon the bill, not putting a direct negative upon its request, as “ accepted,” (25) “ presented,”

(23) *Glossop v. Jacob*, 4 Campb. 227. 1 Stark. 70. Action against acceptor on bill payable sixty days after sight ; the acceptance was “ Accepted, 25th October, 1814. B. Jacob.” The signature only was Jacob’s ; whose the other words were did not appear ; but it was proved to be usual for a clerk to write “ accepted,” and the date, and for the drawee then to subscribe his name ; and Lord Ellenborough, on objection, said he should leave it to the jury to presume the words were written with defendant’s privity when he accepted the bill, unless defendant could give some other date to the transaction. The jury presumed accordingly, and verdict for plaintiff.

(24) Vide *Pillans v. Van Mierop*, *Mason v. Hunt*, *Powell v. Monnier*, and *Pierson v. Dunlop*, *antè*, p. 172, 173, 174.

(25) *Anon. Comb.* 401. per Holt C. J. If the drawee underwrites a bill “ presented such a day, or only the day of the month,” it is such an acknowledgment of the bill as amounts to an acceptance ; and this was declared by the jury to be the common practice.

Powell v. Monnier, 1 Atk. 611. A bill was sent by the post to the drawee for acceptance ; he entered it in his bill-book (which was his practice with all bills he received whether he meant to accept them or not), wrote upon it the number of the entry, and kept it ten days ; on the tenth he wrote upon it the day of the month, and returned it, saying he could not accept it : and per Lord Hardwicke, “ It has been said to be the cus-

“seen,” (25) “the day of the month,” or a (26) direction to a third person to pay it, is *primâ facie* a complete acceptance.

It has indeed been said (27), that an express refusal to accept, written on a bill, is an acceptance; but this is not the case, unless it be accompanied with a conduct showing an intent to create a belief that it is accepted.

On a written acceptance on the bill by any other

“tom of merchants, that if a man underwrites any thing, be it what it may, it amounts to an acceptance; but if there were nothing more than this in the case, I should think it of little avail to charge the defendant;” but he decided that a letter the drawee had written amounted to an acceptance. *Vide antè*, p. 174.

(26) *Moor v. Whitby*, B. R. Tr. 10 G. 3. Bull. Ni. Pri. 270. A bill drawn by Newton on Whitby, was presented for acceptance, and Whitby wrote upon it, “Mr. Jackson, please to pay this note, and place it to Mr. Newton’s account. R. Whitby.” It was insisted that this was no acceptance, but merely a direction to Jackson to pay it out of a particular fund, and if there was no fund there was to be no payment; *sed per Cur.* “this is a direction to Jackson to pay the money, and it signifies not to what account it is to be placed; that is between Jackson and Whitby only, this is clearly an acceptance.”

(27) In Ann. 75. is this note:—“Underwriting or indorsing a bill thus, ‘I will not accept this bill,’ is held by the custom of merchants a good acceptance;” but by Lord Mansfield in *Peach v. Kay*, in sittings after Trinity Term, 1781, “it was held by all the Judges that an express refusal to accept, written on the bill, where the drawee apprised the party who took it away what he had written, was no acceptance; but if the drawee had intended it as a surprize upon the party, and to make him consider it as an acceptance, they seemed to think it might have been otherwise.”

person than the drawee, it should seem essential that his name should appear.

A promise to accept an existing bill if made upon an (28) executed consideration, or if it (29) influence any person to take or retain the bill, is,

(28) Vide *Pillans v. Van Mierop*, antè, p. 172.

(29) Vide *Pierson v. Dunlop*, and *Mason v. Hunt*, antè, p. 172, 173.

Clarke and others v. Cock, 4 East's Rep. 57. Woodward authorized the defendant to receive certain African bills, of which he sent him a list, and apprized him that he had drawn upon him for the amount. The defendant, by letter, acknowledged the receipt of the list, and assured Woodward that the bills he had drawn on him "should meet with due honour." The plaintiffs, who were Woodward's bankers, and greatly in advance to him, having refused to give him further credit, he indorsed to them the bills which he had so drawn upon the defendant, and at the same time either communicated the purport of the defendant's letter or else represented his having made an absolute promise to accept, but did not show the letter itself; and the plaintiffs, on the faith of defendant's promise, advanced to Woodward the full amount of the bills. The defendant afterwards wrote to Woodward, that the African bills had been attached, and Woodward in answer desired them to refuse acceptance of the bills drawn on him. The defendant did in fact receive the amount of the African bills before the bills drawn on him became due; but this amount was afterwards attached in his hands, and upon that attachment he paid over the money so received. This action was brought against the defendant as acceptor of the bills drawn by Woodward; a verdict was found for the plaintiffs, subject to the opinion of the Court. The Court held that this was a good acceptance, and that the subsequent circumstances had not done it away; and therefore awarded the *postea* to the plaintiff. Lawrence J. said the defendant might have resisted the attachment on the ground of his acceptances, which would have been a defence to him.

where 1 & 2 G. 4. c. 78. s. 2. does not apply, a complete acceptance as to the person to whom the promise is made in the one case, and as to the person influenced in the other, and as to all the subsequent parties in each.

A promise by the drawee to the person who ought to provide funds for the payment of a bill, and who actually furnishes them to the drawee, that the drawee will apply such funds to that purpose, is, where 1 & 2 G. 4. does not apply, a sufficient acceptance; though the bill be in the hands of an indorsee, and the action upon it be brought by such indorsee. (30)

At least, if the person to whom such promise was made were the drawer of the bill, or (30) identified with the drawer.

(30) *Fairlee v. Herring*, 3 Bingham 625. Mornay, and, under him, Exter, were agents in Mexico for defendants. Exter, under the direction of Mornay and with the approbation of defendants, drew in Mexico on defendants for 11,458*l.*, in favour of Herrera and Richie or order; and plaintiffs were indorsees. Defendants assigned to the Mexican Mining Association the concern on account of which these bills were drawn, and the Mexican Company was to pay them; but Powles one of the defendants, requested Mornay, who now acted for the Mexican Company, to furnish Defendants with the 11,458*l.*, as it would be unpleasant for defendants to have bills drawn on them paid by another house; and it was agreed between Powles and Mornay that defendants should have the money for the specific purpose of paying the bills. The bills were afterwards left with defendants for acceptance, but they declined accepting. Herring, another of the defendants, on being told of the non-acceptance, said, "What! not accepted! we have had the money, and they ought to be paid. But I don't interfere in

But a promise to accept a bill to be afterwards drawn, is (31) no acceptance of the bill when drawn unless some person be thereby (32) induced

this business ; you should see Mr. Powles." Plaintiffs, in ignorance of these facts, protested the bills for non-acceptance, but afterwards sued defendants as acceptors. A case being reserved, the question was, Whether, upon what had passed between defendants and Mornay, plaintiffs were entitled to treat defendants as having accepted the bills? It was objected that plaintiffs could take no advantage of what had passed between defendants and Mornay, Mornay not being a party to the bills ; and that at all events, plaintiffs having protested the bills for non-acceptance, could not now say they were accepted. But the Court held, that Mornay was identified with Exter the drawer ; that the promise made by Powles to him was therefore a valid acceptance, and enured to the benefit of every body whose name was on the bills ; and that plaintiffs could not be prejudiced by the protest made by them in ignorance of their right. Judgment for plaintiffs.

(31) *Johnson v. Collings*, 1 East's Rep. 98. Collings owed Ruff 23*l.* 10*s.* 6*d.* Ruff applied for payment, and Collings said that if Ruff would draw for it at two months he would pay it. Ruff drew accordingly, and indorsed the bill to the plaintiff, but did not mention to him Collings's promise. The plaintiff sued Collings, on the ground, that his promise to Ruff was virtually an acceptance. But Le Blanc J. thought that as it was not made to a third person, nor with circumstances which might induce a third person to take the bill, it was no acceptance, and nonsuited the plaintiff. On a rule nisi for a new trial, and cause shown, the whole Court thought it no acceptance : and Lord Kenyon thought that the admitting a promise to accept, made before the existence of the bill, to operate as an actual acceptance of it afterwards, even though a third person were thereby induced to take the bill, was carrying the doctrine of implied acceptances to the utmost verge of the law, and he doubted whether it did not go beyond the proper boundary. Rule discharged.

(32) Vide *Pierson v. Dunlop*, and *Mason v. Hunt* *antè*, p. 172, 173. and *Johnson v. Collings*, *suprà*.

to take or retain the bill; and indeed it may be doubted, whether in any case, a promise to accept a non-existing bill, would (33) now be considered as an acceptance of the bill when drawn.

And a promise to accept, made upon an executory consideration, is in no case (34) binding so long as such consideration remains executory, unless it influence some person to take or retain the bill.

A promise to the drawer, that a bill then drawn (35) "shall meet with due honour;" or that the writer will (36) "accept or certainly pay" it, is,

(33) Vide *Johnson v. Collings*, antè, p. 186. n. (31).

(34) In *Pillans v. Van Mierop*, antè, p. 172. n. (4), Burr. 1666. Lord Mansfield says, "It was argued upon at the trial, that "this imported to be a credit given to the plaintiffs in prospect "of a *future* credit to be given by them to White; and this "credit might well be countermanded before the advancement "of any money; AND THIS IS SO."

(35) See *Clarke v. Cock*, antè, p. 184. n. (29), and *Pierson v. Dunlop*, antè, p. 172. n. (4).

(36) *Wynne v. Raikes*, 5 East's Rep. 514. On 9th Nov. 1801, Brown in America, drew on the defendants in London, a bill for 500*l.* at sixty days after sight; and on the same day wrote to them, that he had valued on them for 5548*l.* by divers bills, of which he requested their acceptance. The bill for 500*l.* which was one of those bills, was indorsed by the payees to the plaintiffs in London, for a valuable consideration. On 2d Jan. 1802, the plaintiffs, on receiving the bill, presented it for acceptance, which was refused. On 13th January, 1802, the defendants wrote to Brown, stating, that as their prospects of security had improved, they would "accept or certainly pay all the bill: which had then appeared." The bill for 500*l.* had so appeared. This letter was received by Brown in America

where 1 & 2 G. 4. c. 78. does not apply, an acceptance.

And this, although the letter containing the promise was not received until (37) after the bill had become due ; and although no person has been (37) induced by such promise, to take the bill.

A promise by the drawee of a bill to a person identified with the drawer (38), that the drawee will accept, is, where 1 & 2 G. 4. does not apply, an acceptance. (38)

And, protesting a bill for non-acceptance after a prior parol acceptance, will not preclude the person protesting from insisting on such acceptance, if he were ignorant, when he had the protest made, that there had been such acceptance. (38)

But, to make a promise, in a letter to the drawer, where the bill is payable to a third person, amount to an acceptance, it ought to be in terms which do not admit of doubt. (39)

on 19th March, 1802. The plaintiffs presented the bill for payment on 6th March, sixty-three days after the presentment for acceptance, and on payment being refused, brought this action on the bill. At the time when the bill was drawn, Brown was indebted to the defendants, and still continued to be so, to the amount of 5000*l*. A verdict was found for the plaintiffs subject to the opinion of the Court of King's Bench. The Court held that the case of *Powell v. Monnier* was in point ; that this was a good acceptance. *Postea* to the plaintiffs.

(37) See *Wynne v. Raikes*, preceding note.

(38) *Fairlee v. Herring*, *antè*, p. 185.

(39) *Rees v. Warwick*, 2 B. & A. 113. 2 Stark. 411. Action against defendant as acceptor of a bill drawn by Denison

An answer in reply to a letter of advice from the drawer desiring it may be honoured, that the bill “shall have attention,” will not, in general, amount to an acceptance. (39)

And it will make no difference that this answer is communicated to an indorsee before he takes the bill. (39)

But if, by the course of dealing between the parties, these words be considered as an acceptance, they will have that effect.

So in cases not within 1 & 2 G. 4., a verbal promise to accept, though the party expressly defer a written acceptance, as where he says, “Leave the bill and I will accept it,” is a (40) complete acceptance. And a verbal promise to accept a

and Co., to the order of Johnson and Co., dated 3d May: 4th May, Denison and Co. wrote to defendant, “We yesterday valued on you, favour Johnson and Co. for 100*l.*, which please to honour:” defendant answered, “Your bill 100*l.* &c. shall have attention.” This letter was shown by Denison and Co. to Johnson and Co., and by them, before he took the bill, to plaintiff; it was insisted this amounted to an acceptance, Bayley J. thought not; but it being suggested that in the dealings between these parties, these words had that meaning, other letters from defendants were read in evidence, but they did not prove the point: the jury intimated their opinion that these words, per se, did not amount to an acceptance; and nonsuit, with liberty to plaintiff to move to enter a verdict; motion accordingly; but the Court were also of opinion that these words by no means imported an unequivocal acceptance of the bill, and as the jury were of that opinion in this case the nonsuit was right.

(40) D. Molloy, B. 2. c. 10. s. 20. Mar. 2d ed. 17.

returned bill when it shall come back, is binding (41) if it do come back.

Saying, "Send the bill to my counting house, and "I will give directions for its being accepted," is not of itself an acceptance; the bill must be sent to the counting-house. (42)

An answer by the drawee when a bill is called for "There is your bill; it is all right," is no (43) acceptance.

Saying, when a bill is presented for payment, "that it will be paid," if said with reference to immediate payment, will not amount to an acceptance, if the person who brought the bill,

(41) *Cox v. Coleman*, *antè*, p. 174. note (7).

(42) *Anderson v. Hick*, 3 Campb. 179. Acceptance being refused by the drawees, the holder remonstrated with the managing partner, who said, "If you will send it to the counting-house again, I will give directions for its being accepted." In an action against the drawees as acceptors, it was urged that without proof of the bill's being again sent to the counting-house, this answer was an acceptance. And per Lord Ellenborough, "it was only a conditional promise to accept, and "could not operate as an acceptance till the bill was sent "back."

(43) *Powell v. Jones, Espinasse*, 17. In an action against the defendant as acceptor of a bill, the only evidence to prove the acceptance was, that when the bill was called for, he returned it, and said, "There is your bill; it is all right." Lord Kenyon thought these words could by no implication amount to an acceptance, and nonsuited the plaintiff. *Vide antè*, p. 183. note (27).

decline the immediate payment (44) because he makes an ulterior demand.

Especially if the drawee has before refused to accept. (44)

In cases to which 1 & 2 G. 4. does not apply, the drawee's keeping a bill presented for acceptance (45), may account to an acceptance ;

(44) *Anderson v. Heath*, Trin. 1815, 4 M. & S. 303. A bill for 2000*l.* at sixty days' sight was presented to defendants, the drawees, 2d August, 1814, for acceptance, which they refused, and it was protested. At the end of the sixty days, 4th October, it was brought for payment, and one of defendants said, " This bill will be paid ; but we cannot allow you for a duplicate protest," which was charged, and he was about to pay the bill ; but the clerk who brought it said, " he could not receive the payment without all the charges, without further orders ;" and he went away for instructions : he returned in half an hour ; but in the interim defendants had learnt that the drawer had failed, and they refused payment. An action was brought on the ground that the saying, " the bill would be paid," was an acceptance ; but, on case, the Court held it was not ; it was said *alio intuitu* ; acceptance did not enter into the contemplation of either party at the time ; they thought of immediate, not future, payment ; defendants did not think of giving a pledge, nor the clerk of receiving one. *Nonsuit*.

(45) *Harvey v. Martin*, King's Bench, sittings after Michaelmas Term, 1806. In an action by the payee and holder of a bill against the defendant as acceptor, it appeared that the bill was drawn in Guernsey, where the drawer and the plaintiff resided, on the defendant, who lived in Cornwall, dated 13th March, 1805, at three months ; within a fortnight after it was drawn, the plaintiff sent it to the defendant, desiring him to accept it, and remit it to S. Dobree, the plaintiff's correspondent in London. On 13th April, 1805, the plaintiff, finding that the bill had not been sent to S. Dobree, wrote to the defendant

And so may his destroying it.

But if there be a refusal to accept, and the holder submit to that refusal, but omit taking the bill

requesting him to accept and send it, stating, that though he considered the keeping the bill as tantamount to an acceptance, yet that it was not the same to him, as S. Dobree would not give him credit for it until he received it accepted. The defendant, however, did not accept the bill, nor remit it, nor give any notice of his refusal so to do. On 1st of June the defendant signed a letter, admitting that he had kept the bill, though told by the plaintiff that he considered his doing so as tantamount to an acceptance, "as he intended to have paid it," but having no effects of the drawer's, he refused to pay: and on 4th July, when the bill was protested for nonpayment, he said he had neglected to write an acceptance upon it, thinking it of no consequence, "as he meant to pay it." Lord Ellenborough referred to a MS. case of *Trimmer v. Oddie*, mentioned post, p. 205., in which Lord Kenyon expressed an opinion, that a mere keeping of a bill was an acceptance; and said he inclined to entertain the same opinion; but should leave that question to the jury on the custom. Gibbs, however, for the defendant, admitting that he could not answer the case, a verdict was found for the plaintiff. And on an application to Lord Ellenborough to certify for a special jury, his Lordship refused, saying that this was a clear case; but that if it had not been attended with such strong admissions on the part of the defendant, but had been a mere case of a bill kept by the drawee, he should have thought it a fit case for a special jury to decide whether such detention of the bill amounted to an acceptance.

See *Scaccia de Commerciis, and Cambio*, fol. 383. num. 335., who, in enumerating the different acceptances, mentions that which is made "*tacite per receptionem et detentionem literarum*." See also Pothier, *Contrat de Change*, part i. c. 3. s. 3. p. 39., who observes, that the ordonnance having directed that an acceptance should be in writing, had rendered inadmissible the "*acceptation tacite*" resulting from the drawee's having received and retained the bill.

away, a subsequent destruction by the drawee is not necessarily an acceptance. (46)

If a bill be sent by the post to the drawee for acceptance, that having been the course between the holder and drawee, a neglect by the drawee to return it for ten or twelve days, whilst he is waiting to see whether the drawer will send him funds, is no acceptance. (47)

(46) *Jeune v. Ward*, 1 B. & A. 653. 2 Stark. 326. Godfrey was entitled to a 200*l.* legacy under a will, to which defendant was an executor, and he drew upon defendant for 150*l.* at sight in favour of plaintiff, who was a creditor: the bill was drawn 28th May; on 29th plaintiff went to defendant, who lived in the country, and left the bill for acceptance: in June plaintiff wrote to defendant's solicitor, Egerton, saying defendant had refused to accept the bill, desiring his assistance to get payment from the drawer: Egerton apprised him when the legacy was to be paid, and Godfrey having received it without paying plaintiff, plaintiff applied to defendant to return the bill, to which defendant replied, that having also been applied to by Godfrey's mother to send it her, he had, to avoid trouble, destroyed it. Plaintiff brought an action, on the ground that the destruction was tantamount to an acceptance; and of that opinion was Lord Ellenborough, and verdict for plaintiff. On rule nisi for a new trial, and cause shown, Lord Ellenborough retained his opinion; and Holroyd J. thought, that, in general, destruction was equivalent to acceptance; but as there was a refusal to accept, and plaintiff seemed to consider defendant not liable in June, he thought there ought to be a new trial, to put the facts upon the record: Bayley and Abbott Js. thought, under the circumstances, the destruction was no acceptance; and rule absolute. Bayley J. doubted whether, in any case, destruction would do more than subject to an action of trover.

(47) *Mason and others v. Barff*, M. 59 G. 3. 2 B. & A. 26. Brankstone used to draw on defendants for wool he sent them:

Though he keep it at the instance of the drawer on a promise from him of funds. (47)

At least, it is not, if by the course of dealing between the holder and the drawee, the former be apprised that the latter will accept, without delay, when he has funds, and that he will not accept without. (47)

A fortiori the holder cannot insist upon it as an acceptance, if he make no remonstrance on account of the delay whilst the bill is kept, or when it is returned unaccepted. (47)

And if the holder send the bill by post to the drawee, and thereby make him his agent, quære, whether any neglect by the drawee will have any other effect than that of subjecting the drawee to a special action for the negligence? (47)

August 1814, plaintiffs, who used to discount the bills, sent one by letter to defendants, and defendants returned it accepted; but said, it would be well for the future if plaintiffs would enquire whether the wools were delivered to the carrier, and the invoices and the carrier's acknowledgment sent, and in such case the bills would be accepted without delay: 25th February, plaintiffs sent another bill for acceptance, which arrived 27th; but defendants, not having received remittance of the invoice, &c. omitted returning it till 8th March, and then sent a letter to say they could not accept, because they had not received the invoice, &c., and said they had kept it during the interval on a promise from Brankstone that the invoice should be sent: this letter arrived 11th March, on which day, before its arrival, plaintiffs sent another bill for acceptance, making no mention of the other bill: defendants kept both bills till 25th March, and then sent back both unaccepted. Plaintiffs insisted that defendants' conduct amounted to an acceptance of both, and

By the usage of trade, a banker in London will not render himself responsible by retaining a check drawn on him (48), provided he return it at any time before five o'clock in the evening of the day on which it is drawn.

An acceptance to pay when remitted for, is (49) a conditional acceptance.

So, an answer by a drawee who lived in London, that a ship was consigned to him and a person in

they brought an action; but, on argument, the Court was clear against plaintiffs; for, as they knew the bills would be accepted without delay if the invoices, &c. were sent, they must have concluded, from the delay, that defendants were waiting for them: that their making no remonstrance when they wrote on 11th March, implied that they so considered it, and their making no reply to the letter of the 8th of March, showed that they did not then consider silence as an acceptance: and had they meant so to consider it, they should at once have written to say so to defendants; because, that would have prevented defendants' keeping the second bill, and would have put them upon getting funds for the first. Nonsuit.

(48) *Fernandez v. Glynn*, 1 Campb. N.P.C. 426. n. In this case it was decided, that, by the custom in London, a banker might return a check at any time before five o'clock of the day on which it was drawn. And although the check had been cancelled by mistake, yet having been returned within the time, the banker was holden to be discharged.

(49) *Banbury v. Lissett*, Str. 1211. The drawee accepted a bill "for Lissett and Galley, of Leghorn, to pay as remitted "from thence at usance;" and it was objected, in an action against him, that there was no evidence to show he had a remittance, and that his acceptance was conditional only. Lee C. J. declared he so understood it; but he left it to the jury, and they found for the defendant upon another point, and gave no opinion upon this.

Bristol, and that till he should know to which port the ship would come he could not accept, connected with a subsequent answer that the bill was a good one, and would be paid though the ship should be lost, was (50) held a conditional acceptance only; it being clear that the drawee looked for an opportunity of reimbursing himself, and had three events in contemplation, — the ship's arrival at Bristol, her arrival at London, and her loss: in the two latter he should have the opportunity, and therefore accepted; in the former he should not, and did not accept.

But, an answer by the drawee, that he would pay if I. S. would not, but that he must first apply to him, not that he thought he would pay, but because he judged it right to put him to the trial, with an

(50) This was the case of *Sproat v. Matthews*, 1 Term Rep. 182. The ship did arrive at London, and the defendant disposed of the cargo; but it appearing that upon the defendant's answer that the bill would be paid though the ship should be lost, the plaintiff noted the bill for non-acceptance, Buller J. held that the acceptance was conditional only, and that the noting showed the plaintiff did not choose to take it, and he directed a nonsuit; and upon a rule to show cause why there should not be a new trial, the Court, viz. Willes, Ashhurst, and Buller, Js. concurred that the acceptance was conditional only; but Willes J. thought if there were a doubt whether it was conditional, or whether the plaintiff had precluded himself from insisting upon it, all the facts should have been left to the jury, and he was therefore of opinion that the nonsuit should be set aside; but the other Judges thought differently, and the rule was discharged.

assurance to the holder that he might rest satisfied of the payment, was, before 1 & 2 G. 4., held (51) an absolute acceptance.

If a man purpose making a conditional acceptance only, and commit that acceptance to writing, he should be careful to express the conditions therein; for it may at least be doubted whether parol evidence of such conditions would be admissible; if it were, the onus of proving them would be upon the acceptor, and the proof would be of no avail if the holder, or any person under whom he claims, took the bill without notice of such conditions, and gave a valuable consideration for it.

(51) *Wilkinson v. Lutwidge*, Str. 648. Two bills drawn on the defendant were sent to him by the plaintiff's agent for acceptance, and he wrote for answer, "The two bills which you sent me I will pay, if the owners of the Queen Anne do not: and they living in Dublin must first apply to them: I hope to have their answer in a week or ten days. I do not expect they will pay them, but I judge it proper to take their answer before I do, which I request you will acquaint Mr. Wilkinson with, and that he may rest satisfied of the payment." He afterwards wrote, "I have not had an opportunity of sending the bills to the owners of the Queen Anne, but will take the first opportunity, and shall then remit to the gentlemen concerned, according to my promise." One of the bills he paid, but being sued upon the other, he contended that his acceptance was conditional only, to pay if the owners of the Queen Anne did not; but Raymond C. J. held it an absolute acceptance, and that the attempt to procure payment from the owners of the Queen Anne was to be made by him, and was wholly for his benefit and accommodation, but that the plaintiff was to have his money at all events. The jury found accordingly for the plaintiff.

A conditional acceptance becomes absolute, as soon as its conditions are performed.

Thus, an answer by the drawee, that he could not accept until a navy bill should be paid, was thought (52) to operate as an absolute acceptance upon the payment of the navy bill.

So, an answer that the bill would not be accepted till certain goods against which it was drawn arrived, was held virtually an acceptance when they did arrive and were received. (53)

But if the drawee say he cannot accept without further directions from I. S., and I. S. afterwards desire him to accept, and draw upon A. B. for the amount, the (54) mere drawing upon A. B. will not

(52) *Pierson v. Dunlop*, *antè*, p. 172.

(53) *Miln v. Prest*, *Holt*, 181. 4 *Camp.* 393. Indorsee against defendant as acceptor, and question whether what defendant had written or said amounted to an acceptance. The drawer bought wheat for defendant, and in a letter to him defendant said he would accept bills for it when they received notice that the wheat was shipped; this letter had been shown to plaintiff (before he took the bill): when the bill was presented for acceptance, defendant said he would not accept till the wheat arrived; the wheat afterwards arrived, and defendant accepted it, and sold it. *Gibbs C. J.* was clear that the letter would have been no acceptance, had it not been shown to plaintiff; but he said a conditional acceptance was valid if the conditions were performed: this wheat arrived, and defendant had it and sold it; and he was clear what defendant had done was equivalent to an acceptance; and verdict for plaintiff.

(54) *Smith and another v. Nissen and another*, 1 *Term Rep.* 269. Taubert ordered goods of the defendants, and desired them to draw on the plaintiffs for the amount, which they did: the

make this an acceptance, although the actual payment of the bill upon him may.

An acceptance varying from the tenor differs from it either in the (55) sum, the (56) time, the (57) place, or (58) mode of payment.

The effect of accepting a bill in such way as to make it payable at a banker's, or elsewhere than at

plaintiffs wrote two letters to the defendants, one saying they could not accept, because the defendants had sent more goods than were ordered, but that they had written to Taubert for further directions; the other, saying they had written to Taubert, and were waiting his answer before they could accept, but had desired the holder to keep the bill; in the mean time, Taubert desired the Plaintiffs to accept, and draw on Goverts for the amount: they accordingly drew on Goverts, who refused to accept, and upon that they paid the bill for the honour of the defendants, and brought an action against them for money paid; the plaintiffs had a verdict; but the defendants moved for a new trial, on the ground that the drawing on Goverts was an acceptance of the bill drawn by the defendants. *Sed per cur.* "What the plaintiffs did, did not amount to an acceptance; they never meant to make themselves liable, unless the bill they drew was accepted and paid," and a rule was refused.

(55) Vide *Wegersloff v. Keene*, antè, p. 175. note (10).

(56) Vide *Walker v. Atwood*, antè, p. 176. note (10).

Paton v. Winter, 1 Taunt. 420. The drawee altered the time of payment of a bill from one month to two, and accepted it; the holder kept it the two months and then presented it for payment; the Court held that this was an acquiescence in the alteration; and the holder having brought an action on the case against the acceptor for having mutilated the bill, they directed a nonsuit.

(57) *Bishop v. Chitty*, and *Smith v. De la Fontane*, post.

(58) Vide *Petit v. Benson*, antè, p. 176. note (10).

the drawee's residence or place of business (59), has been matter of great controversy and difference of opinion; but the point is now settled by 1 & 2 G. 4. c. 78. (60)

By that statute, if the acceptance merely make it payable at a particular house, without any further expression in such acceptance, it is to be deemed a general acceptance. (60)

If it make it payable at that house *only*, "and not elsewhere," a qualified one. (60)

Where it operates as a general acceptance, a neglect to present for payment on the day it becomes due, or within a reasonable time afterwards, will not throw the loss upon the holder and discharge the acceptor; though the house fail in the interim, with money in their hands of the acceptor to the amount of the bill: for, upon a general acceptance, no neglect to present for payment will discharge the acceptor; and an acceptor

(59) See post.

(60) By 1 & 2 G. 4. c. 78, After 1st August, 1821, if any person shall accept a bill of exchange, payable at the house of a banker or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill; but, if the acceptor shall in his acceptance express that he accepts the bill payable at a banker's house or other place only, and not otherwise or elsewhere, such acceptance shall be a qualified acceptance of such bill, and the acceptor shall not be liable to pay the said bill, except in default of payment when such payment shall have been first duly demanded at such banker's house or other place.

should see from time to time how his account with the house stands, and what bills are paid. (61)

And a total neglect to present it there will not exonerate the acceptor from paying the principal ;

But it will from paying the interest. (62)

Though any acceptance varying from the tenor will bind the person making it, the holder of a bill is entitled from the undertaking of the drawer and indorsers to expect an absolute acceptance by the drawee (63) ; (or, if there be several not connected in partnership, by (64) each), for the payment of the full (65) sum of money mentioned therein (66)

(61) *Turner v. Hayden*, 1 *Ryan & Moody*, 215. 4 *Barn. & Cr.* 1. Two bills were drawn on defendant, due 21st and 31st August : defendant accepted them "payable at Marsh and Co.'s." Marsh and Co. stopped payment 13th September. Defendant had money in their hands beyond the amount of the bills, from the time the bills became due till Marsh and Co. failed. The bills were not presented at all at Marsh and Co.'s, and they were not presented to defendant till 21st September. It was insisted, that as the bills would have been paid had plaintiff presented them at Marsh and Co.'s before 13th September, plaintiff ought to bear the loss. Abbott C. J. thought otherwise, but saved the point ; and on motion for nonsuit the Court agreed with him, that as this was to stand as a general acceptance, plaintiff was under no obligation to present the bill at Marsh and Co.'s ; and if not, he was not guilty of what the law calls laches : he had only omitted doing what he was not bound to do.

(62) *Phillips v. Franklin*, post.

(63) *Mar.* 2d ed. 22.

(64) *Molloy*, B. 2. c. 10. s. 18, 19. *Mar.* 2d ed. 16.

(65) *Molloy*, B. 2. c. 10. s. 20. *Mar.* 2d ed. 17. *Beawes*, s. 218. p. 443.

(66) *Molloy*, B. 2. c. 10. s. 28. *Mar.* 2d ed. 21. *Beawes*, s. 221. p. 444.

according to its tenor; specifying (67) (if none be mentioned for the purpose) a place for its payment, and (68) expressing, if the bill be payable within a limited time after sight, the time of its presentment for acceptance: and he may reject any other.

If upon the offer of any other acceptance the holder do any act expressing a refusal to take it, as, if he give notice to any of the antecedent parties generally that acceptance is refused, or if he note or protest the bill for non-acceptance, the offer (69) is not binding.

But, protesting a foreign bill upon the refusal to give a written acceptance will be no waiver of a previous parol acceptance, if the holder were ignorant of that acceptance when he made the protest. (70)

See *Boehm v. Garcias*, 4 Campb. 425., where Lord Ellenborough held that the holder was not bound to take an acceptance to pay in a different kind of currency from that mentioned in the bill.

(67) *Mutford v. Walcot*, Lord Raym. 575. per Holt C. J.: "If a bill be payable at London, and the person on whom it is drawn accept it, but names no house where he will pay it, the party that has the bill is not bound to be satisfied with this acceptance."

(68) *Beawes*, p. 452. Where a bill is drawn payable at so many days' sight, the acceptance must express the day it is made.

(69) *Sproat v. Matthews*, *antè*, p. 196. note (50), and *Ben-tinck v. Dorrien*, *post*, p. 207. note (77).

(70) *Fairlee v. Herring*, 3 Bingham. 625. Plaintiffs left a bill for acceptance, and upon non-acceptance protested it. They

There is a case (71), however, in which it has been supposed to have been decided, that if the holder strike out an acceptance which varies from the tenor of the bill, and substitute an acceptance according to the tenor, he may afterwards restore the acceptance he struck out, and that such acceptance will continue binding; but it has (72) been doubted whether the determination went farther than to decide, that the alteration in the acceptance (though it annulled the acceptance and discharged the acceptor) did not destroy the obligation of the bill as to the other parties.

afterwards discovered that there had previously been a parol acceptance, and they thereupon brought an action upon it against the drawees. Upon a case reserved, it was insisted that the protest for non-acceptance precluded plaintiffs from saying there had been an acceptance: but as plaintiffs were ignorant of the parol acceptance when they made the protest, the Court were clear the protest did not destroy their right to insist upon the parol acceptance: judgment for plaintiffs.

(71) *Price v. Shute, Beawes, s. 222. 1st ed. p. 444. Moll. B. 2. c. 10. s. 28.* A bill was drawn payable the 1st of January, and the drawee accepted it to pay the 1st of March: the holder struck out the 1st of March, and substituted the 1st of January, and sent the bill for payment on that day, which the acceptor refused: the holder then struck out the 1st of January and restored the 1st of March; and in an action on this bill, the question was, Whether these alterations did not destroy the bill? And Pemberton C. J. ruled that they did not.

(72) In *Master v. Miller, 4 Term Rep. 330., Lord Kenyon*, in commenting on the case of *Price v. Shute*, observes, that the books do not say against whom the action was brought; and it could not have been against the acceptor, because his acceptance was struck out by the party himself who brought the

An alteration in a material point certainly vacates an acceptance. (73)

And an alteration by substituting or adding a new place for payment is an alteration in a material point. (73)

An acceptance once completed and issued (74) cannot be revoked.

And there are cases (75) in which it was held,

action; and he concludes, "that on the person to whom the bill was directed refusing to accept the bill as it was originally drawn, the holder resorted to the drawer;" however Buller J., 4 Term Rep. 336., says, he cannot consider this case in any other light than as an action against the acceptor, because the books only state what passed between the holder and the acceptor.

(73) *Tidmarsh v. Grover*, 1 M. & S. 795. Defendant accepted a bill "payable at Bloxam and Co.'s." Bloxam and Co. failed; the holder struck out their names, and without defendant's knowledge or consent inserted "Esdailles." — The point was reserved whether this alteration vacated the acceptance, and the Court held it did, and ordered a nonsuit to be entered.

Cowie v. Halsall, 4 Barnew. and Ald. 197. Indorsee against acceptor. It appeared that the acceptance was general, and that the drawer, without the acceptor's knowledge, added to the acceptance, "payable at Mr. B.'s, Chiswell-street," and on the ground that this was a material alteration, and vacated the acceptance, verdict for defendant. Motion for a new trial; but the Court thought the verdict right, for this alteration would lead to a presentment at B.'s, not at defendant's, and the bill might be treated as dishonoured, and defendant be arrested thereon, without any presentment where defendant would expect it; and rule refused.

(74) See *Marius*, p. 20. and the cases mentioned in the next two notes.

(75) *Thornton and another v. Dick and another*, 4 Esp. N.P.C. 270. A bill drawn on the defendants, payable three

that if the drawee wrote an acceptance upon a bill he could not afterwards cancel it, though he

months after sight, was, on the 1st of October, left with them by the plaintiffs for acceptance. It was not called for until the 11th; when it appeared that the words, "Accepted the 1st of Oct. 1799. Q. Dick and Co." had been written upon the bill, and afterwards nearly obliterated by ink. The words, however, were still legible. At the time of drawing the bill the defendants were in advance to the drawer. The plaintiffs, as indorsees, sued the defendants as acceptors. The acceptance and subsequent cancellation were admitted: and the only question was, whether the cancellation, having been made before the redelivery of the bill, had discharged the acceptor. Lord Ellenborough said, that if a party once accepted a bill he had done the act, and could not retract; and that there was no difference in point of legal effect, whether the bill were payable after sight or after date. Verdict for the plaintiffs. — *Trimmer v. Oddie* was cited: in that case, however, the declaration contained counts against the drawee for having mutilated the bill.

Trimmer v. Oddie, 1800. A bill was left for acceptance and accepted, but the acceptance was afterwards cut off, and the bill returned in that mutilated state. Lord Kenyon was clearly of opinion, that the acceptance once made could not be revoked, and that the acceptor was still bound. This case was cited in *Bentinck v. Dorrien*, 6 East's Rep. 200., and the Hamburg ordinance was referred to as having been recognized by Lord Kenyon to be the law of merchants here: and Lord Ellenborough said, "The rule is certainly laid down in the Hamburg ordinance as stated, that an acceptance once made cannot be revoked; though, to be sure, that leaves the question open as to what is an acceptance, whether it be perfected before the delivery of the bill." And Lawrence J. in the case last mentioned, 6 East's Rep. 201., said, "When the general question shall arise, it will be worth considering how that which is not communicated to the holder, can be considered as an acceptance while it is yet in the hands of the drawee; and where he obliterates it before any communication made to the holder."

cancelled it whilst the bill remained in his possession and before it had been called for by the holder. But the contrary has since (76) been decided.

From this it would appear, that Mr. J. Lawrence had taken the same view of this question as Pothier, who cites from La Serra, ch. 10. a case where the holder of a bill having left it for acceptance, the drawee, before he returned it, cancelled an acceptance which he had written and signed upon it, and it was adjudged that this acceptance was annulled: and observes, “La raison est, que le concours de volontés qui forme un contrat, est un concours de volontés que les parties se sont réciproquement déclarées; sans cela, la volonté d’une partie ne peut acquérir de droit à l’autre partie, ni par conséquent être irrévocable. Suivant ces principes, pour que le contrat entre le propriétaire de la lettre et celui sur qui elle est tirée soit parfait, il ne suffit pas que celui-ci ait eu pendant quelque temps la volonté d’accepter la lettre, et qu’il ait écrit au bas qu’il l’acceptoit; tant qu’il n’a pas déclaré cette volonté au porteur, le contrat n’est pas parfait; il peut changer de volonté, et rayer son acceptation.” — *Traité du Contrat de Change*, part 1. ch. iii. s. 3. pl. 44. — See also Emerigon, *Traité des Assurances*, ch. ii. s. 4. p. 45., who observes, that La Serra “pose en maxime, que tant que l’acceptant est maître de sa signature, c’est-à-dire, qu’il n’a pas délivré la lettre de change, il peut rayer son acceptation.”

(76) *Cox v. Troy*, 5 Barnew. & Ald. 474. A bill on defendant and Co. for 938*l.* 16*s.* 10*d.*, payable sixty-one days after sight, was put into their bill-box for acceptance the 24th of May, 1820; they wrote an acceptance upon it, and dated it 24th May, 1820; the bill was not called for till the 27th of May, and before that time the acceptance was erased by inking it over: when, or by whom that was done, did not appear. Plaintiffs brought an action on the ground that the writing the acceptance bound the drawee, and that he could not afterwards cancel his acceptance: but on case, the Court were clear the acceptance might be cancelled at any time before it was de-

And before this decision it was adjudged, that if, upon such a cancellation, the holder noted the bill for non-acceptance, he (77) precluded himself from insisting that the acceptance was binding.

And if an acceptance be struck out before a bill left for acceptance is called for, the drawee is not compellable to show in evidence why it was struck out, or when, or by whom. (78)

And it makes no difference though the bill be left beyond the usual time with the drawee, if the delay be imputable not to the drawee but to the holder.

livered out by the drawee, and they ordered the postea to be delivered to the defendant. Plaintiff had leave to turn the case into a special verdict.

(77) *Bentinck v. Dorrien* and another, 6 East, 199. Action by indorsee against defendants as acceptors of a bill, was referred; and the arbitrator, after reciting in his award that the plaintiff, on the 31st of May, left the bill with the defendants for acceptance, that they signed an acceptance thereon, but that, on the 1st of June, and *before the bill was called for*, they cancelled that acceptance, and that the plaintiff thereupon noted the bill for non-acceptance, declared himself to be of opinion, that by such noting the plaintiff had precluded himself from insisting that the defendants had bound themselves to pay the bill, and therefore awarded in favour of the defendants. A rule nisi was obtained for setting aside this award, on the ground that the acceptance was irrevocable. But, after cause shown, the Court held that whether such acceptance could or could not be revoked, the plaintiff had, at all events, by noting the bill for non-acceptance, precluded himself from contending that the acceptance was valid. Rule discharged. See *Sproat v. Matthews*, ante, p. 196. note (50).

(78) See *Cox v. Troy*, ante, p. 206.

The obligation also of a complete acceptance may be (79) waived.

This waiver may be either expressed or implied.

An (80) agreement to consider an acceptance as at an end, or a (81) message to the acceptor upon

(79) *Vide Walpole v. Pulteney*, and *Black v. Peele*, *infra*, and *Mason v. Hunt*, *post*, p. 209. note (82); — and in *Dingwall v. Dunster*, *post*, p. 214. note (91), the whole Court held, that though nothing short of an express agreement would discharge the acceptor, an express agreement would.

Whatley v. Tricker, 1 Camp. 35. The indorsees of a bill, knowing that it had been accepted for the accommodation of the drawer, and possessing goods of the drawer's from the produce of which they expected payment, said (at a meeting of the acceptors' creditors), that "they looked to the drawer, and "should not come upon the acceptors:" in consequence of which the latter assigned their property for the benefit of their creditors, and paid them 15s. in the pound. The drawer's goods proved to be of little value, and he became insolvent, upon which the indorsees sued the acceptors. Lord Ellenborough said, "If the plaintiff's language amounted to an unconditional renunciation of all claim upon the acceptors, "whereby the latter had entered into the arrangement with their "creditors, the acceptors were discharged; if only to a conditional promise, not to resort to the acceptors, if satisfied elsewhere, they were not." The jury found for the plaintiffs.

(80) *Walpole v. Pulteney*, cited Dougl. 236, 237—248, 249. Walpole held a bill accepted by Pulteney, but agreed to consider his acceptance as at an end, and wrote in his bill-book, opposite the entry of this bill, "Mr. Pulteney's acceptance at "an end." Walpole kept the bill from 1772 to 1775, without calling upon Pulteney, and then brought this action. The jury found a verdict for the plaintiff; but the Court of Exchequer thought the verdict wrong, and granted a new trial, upon which the jury found for the defendant.

(81) *Black v. Peele*, *cit. Dougl.* 236, 237—248, 249. Black arrested Peele as acceptor of a bill drawn by Dallas, but on

an accommodation bill, that the business was settled with the drawer, and he need give himself no further trouble, is an express waiver; the receipt (82) of the known consideration of the acceptance, an implied one.

But a declaration by the holder that he should

finding that the acceptance was an accommodation one, his attorney took a security from Dallas, and sent word to Peele that he had settled with Dallas, and that Peele need give himself no further trouble; Dallas afterwards became bankrupt, upon which Black again sued Peele; but it was held, that as Black had in express words discharged Peele, the action could not be maintained.

(82) *Mason v. Hunt*, Dougl. 284. 297. antè, p. 173. note (4). Rowland Hunt agreed that his partner, Thomas Hunt, should, on consignment of a cargo, and an order for its insurance, accept bills for 3,600*l*. The cargo was consigned, the order for insurance given, and Thomas Hunt effected the insurance, but he refused to accept the bills; after some negotiation, the plaintiff, being the holder, signed a memorandum, by which, after stating that the consignment had been made on account of the bills, and that the Hunts, being apprehensive that the net proceeds might not be sufficient to discharge them, had refused to accept, he accepted the bill of lading and policy, and undertook to apply the net proceeds, when in cash, as far as they would go, to the credit of the payee, in part payment of the bills: the plaintiff afterwards sued the Hunts; and insisted that Rowland Hunt's agreement was an acceptance; but after a verdict for the defendant, and time taken to consider upon a rule to show cause why there should not be a new trial, the whole court was clear that by the memorandum the plaintiff had waived all right to insist on Rowland Hunt's agreement, for it was obvious that the whole consideration of the acceptance was the consignment, upon which there would be a commission, and the policy, and these the plaintiff had taken to himself.

look to the drawer for payment, and that he wanted no more of the acceptor than another debt, not connected with the bill, will not be sufficient to discharge the acceptor. (83)

Though, in consequence of that declaration, the acceptor pay the other debt. (83)

An express agreement will discharge the acceptor. (84)

Or an express renunciation of all claim upon him. (84)

Or neglect to get paid when the holder has the means. (84)

Nothing else short of actual payment will. (84)

Length of time alone will not. (84)

Nor will length of time and silence, though the holder took the bill from the drawer, and hold it for his, the drawer's, balance, and though he be banker to the acceptor. (84)

(83) *Parker v. Leigh*, 2 Stark. 228. In an action against the acceptor on a bill for 300*l.*, the defendant proved that he owed plaintiff 700*l.* on warrants of attorney, and that plaintiff had said, that as to a 300*l.* bill, he should look to the drawer for that, and that he wanted no more from defendant than what was included in the warrants of attorney, and that in consequence of this declaration defendant paid plaintiff what was included in the warrants of attorney; but Lord Ellenborough held, that as plaintiff had not expressly renounced all claim upon this acceptance, it continued binding, and the plaintiff had a verdict.

(84) *Farquhar v. Southey*, 1 Moody & Malkin, 14. Defendants accepted two bills for 500*l.* to accommodate Leader. Leader indorsed them to plaintiffs, his bankers, to whom Leader

And it will be no laches in the holder so as to discharge the acceptor, though the acceptor has occasionally a balance in his hands, out of which the banker might have paid himself. (84)

If the holder of a bill receive a part of the money from the drawer, and take a promise from him upon the back of the bill for the payment of the residue at an enlarged time, it (85) is for a

was indebted. Plaintiffs kept them three years after one became due, and four years after the other, when Leader became bankrupt. Plaintiffs debited Leader with interest upon them till his bankruptcy; but up to that time they did not present the bills to defendants, nor make any demand upon them. Leader had never any balance in plaintiffs' hands whilst plaintiffs held the bills. Some time after the bills were due, defendants opened an account with plaintiffs, and on two occasions they had balances to more than the amount of these bills. It was insisted that plaintiff should have paid himself out of those balances, and that he discharged defendants by not doing so. Littledale J. thought otherwise; and after noticing that nothing would discharge an acceptor but payment, express agreement, express renunciation, or neglect to get paid when the means were in the holder's own power, he said the only questions he could leave to the jury were, Whether plaintiffs ever entered into any agreement to discharge defendants, or expressly renounced all intention of holding them liable? The questions were left accordingly, and the jury found for plaintiffs.

(85) *Ellis v. Galindo*, B.R. M. 24 Geo. 3. cited Dougl. 250. note. James Galindo drew upon his brother for 30*l.* in favour of the plaintiff; when the bill became due James paid the plaintiff 3*l.* 15*s.* 4*d.*, and indorsed a promise to pay the remainder in three months. Three years elapsed, and then the plaintiff sued the drawee upon his acceptance. Lord Mansfield thought the defendant discharged, and nonsuited the plaintiff. An application was made for a new trial, when Lord Mansfield said,

jury to say whether this is not a waiver of the acceptance.

Where a bill has been accepted for the mere accommodation of the drawer, it has been held, that if the holder, knowing that circumstance, give time to the drawer, he (86) will discharge the acceptor.

But this has been doubted. (87) (88) (89)

he thought the case did not interfere with that of *Dingwall v. Dunster*; but a rule to show cause was granted: after cause was shown, Lord Mansfield said, "The doubt is, whether the question should not have been left to the jury, it being a question of intention arising out of the circumstances." Willes J. thought it should have been left to the jury; and per Buller J., "I rather think the case should have gone to the jury; but I am not therefore of opinion that there ought to be a new trial: the indorsement could not have been meant as an additional security, for the drawer was equally liable before. I should have left the question to the jury, but with very strong observations; and as the demand is so small, I do not think there ought to be a new trial." Rule discharged.

(86) *Laxton v. Peat*, 2 Campb. N. P. C. 185. The holder of a bill, knowing that it had been accepted for the accommodation of the drawer, received part payment from the drawer, and gave him time for payment of the remainder: he afterwards sued the acceptor; but Lord Ellenborough held, that the acceptor was a mere surety, and by time having been given to the principal, was discharged. Nonsuit.

(87) *Raggett v. Axmore*, 4 Taunt. 730. In an action against the acceptor of a bill, motion for new trial, on the ground that it was an accommodation acceptance, and that the holder had given time to the drawer. Sed per Mansfield C. J., "There was no sufficient evidence that it was an accommodation acceptance; nevertheless, excepting in the case in *Campbell*, it never was known that any thing passing between other parties

Especially if the holder, when he took the bill, did not know it was an accommodation acceptance. (88)

Or if it were duly presented, when due, to the acceptor, and he promised payment. (89)

Telling an accommodation acceptor that he shall not be troubled about the bill, will not discharge him, though the party knew him to be an accom-

“ could discharge an acceptor; but it is unnecessary to decide “ that question.”

(88) *Fentum v. Pocock*, 5 Taunt. 192. Indorsee against acceptor, on bill drawn by Beazley. Defence, that plaintiff had taken a cognovit from Beazley, payable at a future day, without defendant's privity or consent; that defendant's was a mere accommodation acceptance, and that plaintiff knew it was so when he took the cognovit from Beazley: Mansfield C. J. thought this no answer to the action; and verdict for plaintiff. On rule nisi for nonsuit, and cause shown, two cases were cited in which Lord Ellenborough, under similar circumstances, held the acceptor discharged; but the Court thought those cases wrong; and rule discharged. Mansfield C. J. noticed that plaintiff did not know, when he took the bill, that it was an accommodation acceptance, but he disclaimed proceeding on that ground.

(89) *Kerrison v. Cooke*, 3 Campb. 362. Indorsee against acceptor. Defence, that it was an accommodation acceptance to accommodate the drawer, that plaintiff knew it, and that on the bill's becoming due, plaintiff gave time to the drawer without the concurrence of defendant; and *Laxton v. Peat* was cited as in point: when the bill was due it was presented to defendant, and he promised payment; per Gibbs J., “ Grave doubts have “ been entertained of *Laxton v. Peat*, and this case may be dis- “ tinguished from it: here payment is demanded of defendant, “ and he promises payment. I think the giving time under “ these circumstances to the drawer did not discharge the ac- “ ceptor.” Verdict for plaintiff.

Sed vide *Adams v. Gregg* — the next case.

modation acceptor only, if such party held for value. (90)

A neglect to call upon an acceptor, or upon any of the other parties, though for ever so long a time, shall (91) not be considered as a waiver.

(90) *Adams v. Gregg*, 2 Stark. 531. Defendant accepted a bill to accommodate Holmes, and plaintiff knew it; Holmes paid it to plaintiff for an old debt: when it became due defendant could not pay it, and one Jones gave plaintiff the amount, on a stipulation that he should, if necessary, stand in plaintiff's situation. Defendant asked Jones to give up the bill, which he refused, but he said defendant should not be troubled about it. Jones afterwards sued defendant in plaintiff's name; defendant insisted she was discharged. Abbott C. J. seemed to think she would have been, had Jones given time to the drawer, or disabled himself for a moment from suing him; but he thought Jones's declaration, that defendant should not be troubled, no discharge, and plaintiff had a verdict.

(91) *Dingwall v. Dunster*, Dougl. 235. 247. Dunster lent Wheate his acceptance, which became due 13th December, 1774; it was then in the hands of Dingwall, but he, finding that Wheate was the real debtor, wrote to his attorney in February and November, 1775, for payment, received interest upon the bill from Wheate, and suffered several years to elapse without calling on Dunster; on 13th of February, 1775, Dunster wrote to thank Dingwall for not proceeding against him, and said, he had been informed by a person Dingwall had sent that Wheate had taken up the bill; but Dingwall took no notice of this letter; he afterwards sued Dunster, for whom the jury found; but, upon a rule to show cause why there should not be a new trial, the whole Court held there was nothing in the plaintiff's conduct to discharge Dunster; that it meant nothing more than an indulgence to him, and that he would try to recover from the drawer if he could. Lord Mansfield said, "No use had been made of the defendant's letter; probably the fact did not

If the holder of a bill agree not to sue the acceptor, upon his making an affidavit that the acceptance is a forgery, he will be (92) precluded from suing him, if such affidavit be made and sworn, though it be false.

"warrant him in asserting that a person the plaintiff sent had told him Wheate had taken up the bill: had the plaintiff, by any thing in his conduct, confirmed him in such a belief, it might have altered the case."

Anderson v. Cleveland, 13 East's Rep. 490. n. In an action by an indorsee against the acceptor of a bill, no demand was proved till three months after the bill was due, and when the drawer had become insolvent. But, by Lord Mansfield, "the acceptor of a bill, or maker of a note, always remains liable. The acceptance is proof of having assets in his hands, and he ought never to part with them, unless he be sure that the bill is paid by the drawer."

(92) *Stevens v. Thacker, Peake*, N. P. C. 187. The plaintiff, who was indorsee of a bill, presented it to the defendant, as acceptor, for payment. The defendant said the acceptance was a forgery, and offered to make an affidavit that he had never accepted the bill. The plaintiff at first agreed not to sue him, if he would make such affidavit; but, being afterwards convinced that the defendant had accepted the bill, refused to receive the affidavit, and brought this action. The affidavit had been engrossed, but not sworn. It was urged, that the plaintiff could not recede from his agreement. But Lord Kenyon said, that had the affidavit been sworn, he should have held that the defendant had discharged himself from this action, though such affidavit had been false. But not having been sworn, the defendant was still liable, unless he could prove the acceptance a forgery. Verdict for the plaintiff.

CHAP. VII.

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THE receipt of a bill or note implies an undertaking from the receiver, to (1) every party to the bill or note who would be entitled to bring an action on paying it, to (2) present in proper time, the one, where necessary, for acceptance, and each for payment; to (3) allow no extra time for payment; and to give (4) notice without delay to such person of a failure in the attempt to procure a proper acceptance or payment; and a (5) default in any of these respects will discharge such person from all responsibility on account of a non-

(1) Vide post, p. 286 to 312.

(2) Vide post, p. 226.

(3) Vide *Tindal v. Brown*, post, p. 256.

(4) Vide post, Sect. 2.

(5) Vide post, Sect. 2.

Syderbottom v. Smith, Str. 649. In an action against the indorser of a note, Eyre C. J. of the Common Pleas, directed the jury to find for the defendant, because the plaintiff had not proved diligence to get the money from the maker; being of the old opinion that the indorser only warrants upon default of the maker.

Gee v. Brown, Str. 792. The holder of an inland bill gave the acceptor time, by intervals, from 14th of May, when the bill became due, to 7th of June, and then sued the drawer; but there being no notice to him, Eyre C. J. held the loss ought to fall on the plaintiff.

acceptance or non-payment, and will, unless (6) the bill or note were on an improper stamp, make it (7) operate as a satisfaction of any debt or demand for which it was given.

The presentment is to be made where the bill or note is payable.

If the drawee or maker cannot be found at the place where the bill or note is payable, and it appear that he never lived there, or has (8) absconded, the bill or note is to be considered as dishonoured, especially if he cannot be heard of at any of the banking-houses there (9); if he have only removed, the holder (10) must endeavour to

(6) See *Wilson v. Visar*, *antè*, p. 80.

(7) By 3 & 4 Ann. c. 9. § 7. It is enacted, that if any person doth accept any such bill of exchange, for and in satisfaction of any former debt, or sum of money formerly due unto him, the same shall be accounted and esteemed a full and complete payment of such debt, if such person accepting of any such bill for his debt doth not take his due course to obtain payment thereof, by endeavouring to get the same accepted and paid, and make his protest as aforesaid, either for non-acceptance or non-payment thereof.

(8) *Anon.* Lord Raym. 743. "The custom of merchants is, that if B., upon whom a bill of exchange is drawn, absconds before the day of payment, the man to whom it is payable may protest it, to have better security for the payment, and to give notice to the drawer of the absconding of B." Proved by merchants at Guildhall, Tr. 6 W. & M., before Treby C. J.

(9) See *Hardy v. Woodroffe*, *post*.

(10) *Collins v. Butler*, Str. 1087. The maker of a note shut up his house before the note became due; and in an action against an indorser, the question was, whether the plaintiff had shown sufficient in proving that the house was shut up?—and

find out to what place he has removed, and make the presentment there.

If on a presentment it appear that the drawee or maker is dead, the holder (11) should enquire after his personal representative, and present the bill or note to him.

If, in the absence of a drawee, a bill has been accepted by his agent, and at the time when the bill becomes due the drawee be still absent, presentment for payment (12) should be made to such agent.

If a bill or note be made payable at a banker's, it is (13) sufficient to present it for payment at the banker's; and, if the banker be himself the holder, it is (13) sufficient for him to see whether he has effects in hand.

Lee C. J. thought not, but that he should have given in evidence that he enquired after the maker, or attempted to find him out. Vide *Baleman v. Joseph*, post, p. 281.

(11) *Molloy*, B. 2. c. 10. s. 34. "If a bill be accepted, and the party dies, yet there must be a demand made of his executors or administrators; and in default of payment, a protest must be made."

(12) See *Philips v. Astling*, post, p. 287.

(13) *Saunderson and others v. Judge*, 2 H. Bl. 509. A note made payable at the plaintiffs' was indorsed to them; when it became due, the maker having no effects in their hands, they wrote to one of the indorsers to say it was not honoured, and afterwards brought an action against him; but it appearing that they had made no demand on the maker, they were nonsuited: on showing cause, however, against a rule for a new trial, the Court held, that it was sufficient to present the note where the maker made it payable, and as the persons at whose house it was

If a bill or note be made payable at a particular house, that house is the proper place at which to make the presentment, whether such house be mentioned in the body of the bill or note, or in a marginal note, or in the acceptance only. (14)

If such house be mentioned in the body of a note, a presentment there is necessary even to charge the maker. (15)

made payable were themselves the holders, it was sufficient for them to refer to their books, and see whether they had effects in hand; and a new trial was granted.

(14) *Ambrose v. Hopwood*, 2 Taunt. 61. In an action against the drawer of a bill, the declaration stated the bill to have been accepted by the drawee, payable at Messrs. Freeman's and Co., No. 6. Church Street, Bermondsey, Southwark, and averred that the bill was in due manner presented to them for payment, (not saying in *Church Street, &c.*) and dishonoured. On special demurrer for other causes (which were abandoned) it was contended that there was no due averment of a presentment for payment, and that this objection, which was *not one of the causes* assigned, went to the substance of the case. The Court held the objection fatal, but permitted the plaintiff to amend on payment of costs.

See *Garnett v. Woodcock*, 1 Stark. 475.

(15) *Sanderson v. Bowes and others*, B. R. Mich. 52 Geo. 3. In an action on twelve country bank-notes, for 1*l.* 1*s.* each, issued by the defendants from their banking-house at Workington, the declaration contained a count upon each note, stating that the defendants made a certain promissory note, "and thereby, on demand, promised to pay at the banking-house at Workington, to one R. N. or bearer," the sum of 1*l.* 1*s.*; and that thereby the defendants became liable, and promised to pay, according to the tenor and effect of the note. There was, however, no averment of a presentment for, or demand of, payment at the banking-house; but only the usual allegation, that the defend-

And so it is if it be printed on the note, though by way of memorandum only. (16)

ants, "although often requested," (without saying where) had refused to pay. To these counts there was a general demurrer and joinder; and after argument, the Court held, that there being no privity between these parties but in respect of the note, and that being a contract to pay at a particular place, a demand of payment at that place was in the nature of a condition precedent to the plaintiff's right to recover; and there being no averment of such demand, the defendants were entitled to judgment; and they gave judgment accordingly.

Dickinson v. Bowes, 16 East, 110. Action against the makers on fifty-six one-guinea notes; they were dated Workington Bank, and ran thus: "On demand I promise to pay at the banking-house here, to R. W. or bearer, the sum of one guinea, value "received." Proof was given that thirty-two were presented for payment at the banking-house at Workington, and payment refused; but there was no such proof as to the other twenty-four, and on point saved, the Court held that plaintiff could only recover in respect of the thirty-two, and judgment accordingly.

Howe v. Bowes, 16 East, 112. Action on a similar note for five guineas against the makers: instead of averring presentment, plaintiff alleged that defendants became insolvent, and ceased and wholly declined and refused to pay, at the banking-house aforesaid, the sum specified in any note issued by them, and he proved that the shop was shut up and no notes paid there for some time before the action; the jury considered this proof as making out the averment, and verdict for plaintiff: and on rule nisi to set aside the verdict, and cause shown, the Court thought the verdict right; the shutting up the shop was in substance a refusal to make any payments there: rule discharged. But on error, the Exchequer chamber thought the allegations in the declaration not sufficient to excuse a presentment, and reversed the judgment, 5 Taunt. 30.

(16) *Trecothick v. Edwin*, 1 Stark. 468. The whole of a note, except the names of parties, sum, and date, was printed; and at the bottom was printed, "at Barclay, Tritton, and Co.'s." In

And if such house be mentioned in an acceptance, and the acceptance make the bill payable there "and not otherwise or elsewhere," a presentment there will be necessary to charge the acceptor. (17)

But, where a particular house is mentioned in a note by way of marginal memorandum only, presentment at that house may not be necessary to charge the maker (18);

Nor is it (since 1 & 2 G. 4. c. 78., on acceptances made after 1st August, 1821,) to charge an

an action against the maker, a question was made whether it was necessary to prove a presentment at Barclay and Co.'s; and Lord Ellenborough held it was, because the stipulation being printed, must have been on the note at the time the note was made, and was to be considered part of the note. The proof was then given, and the plaintiff had a verdict.

(17) See 1 & 2 Geo. 4. antè, p. 200.

(18) In *Wild v. Rennards*, 1 Campb. N.P.C. 425. n. Bayley J. held, that if a promissory note be made payable at a particular place, there is no necessity for proving, in an action against the maker, that it has been presented there for payment. And upon this case being cited in *Sanderson v. Bowes*, Bayley J. said, that as far as he could recollect, the place was not incorporated with the body of the note; it was only mentioned in a memorandum at the bottom. And in *Callaghan v. Aylett*, 2 Campb. N.P.C. 551., and *Sanderson v. Judge*, 2 H. Bl. 509., the same distinction is taken.

Price v. Mitchell, 4 Campb. 200. At the bottom of a note was written, "At Vere and Co.'s, 77. Lombard Street." In an action against the maker, it was urged that plaintiff ought to prove a presentment at Vere and Co.'s; but as the direction was only at the foot of the note, and not part of the note, Gibbs C. J. thought otherwise, and the plaintiff had a verdict.

acceptor, where the acceptance mentions that house without further expressions to make it the exclusive place of payment. (19)

In an action against the acceptor upon a bill payable, by the language of the bill, at a particular place, a presentment at that place need not be averred nor proved: the statute 1 & 2 G. 4. c. 78. applies equally, whether the bill is made payable at a particular place by the language of the bill, or by the language of the acceptor. (20)

And where a bill is so accepted or framed as to make it necessary even to charge the acceptor that it should be presented for payment at a particular place, a neglect to present it there the very day it

(19) See 1 & 2 Geo. 4. antè, p. 200.

(20) *Selby v. Eden*, 3 Bingham 611. Action against acceptor on bill drawn payable in London: there was no averment of presentment in the declaration, nor proof of any at the trial: the objection to the want of proof was made at the trial, and over-ruled: the objection to the want of averment was made in arrest of judgment; but on rule nisi, and cause shown, and time to consider, the Court held the statute applied, and the averment was unnecessary. Rule discharged.

Fayle v. Bird, 6 Barn. & Cr. 531. Action against acceptor on bill requiring defendant, two months after date, to pay to plaintiff's order in London 5*l.* 12*s.* 6*d.*: the acceptance was "accepted payable at W. Metcalfe's, Esq., Coal Exchange, London:" presentment at Metcalfe's was averred, but not proved, and on that ground nonsuit; but on rule nisi to enter verdict for plaintiff, and cause shown, the Court thought *Selby v. Eden* decisive, and observed that uniformity of decision was in all cases important, especially upon questions affecting such negotiable instruments. Rule affirmed.

Vide post.

becomes due will not discharge the acceptor; unless the money be lost in consequence of such neglect. (21)

If the money be lost in consequence, it may. (21)

If a check upon a banker be lodged with another banker, a presentment by the latter at the clearing house is (22) sufficient.

A presentment should be made at a seasonable time.

If by the known custom of any place, bills and notes be only payable within limited hours, a presentment *there* out of those hours is unseasonable.

And so is a presentment out of the hours of business to a person of a particular description (as a (23) banker), in a place where, by the known

(21) *Rhodes v. Gent*, 5 B. & A. 244. In an action on an acceptance, payable, when due, at Messrs. P. and H.'s, bankers, London, it was proved that the bill was presented for payment at Messrs. P. and H.'s, but that such presentment was not until several days after the bill became due. Abbott C. J. thought the plaintiff nevertheless entitled to a verdict; and on motion to set aside the verdict, all the Judges in court, viz. Abbott C. J., and Holroyd and Best Js., held, that as the bill had been presented at the banker's, and the non-payment arose not because the bankers had failed, but from some other cause, and the acceptor was not prejudiced by the postponement of the presentment, such postponement was no defence to him; and a rule was refused.

(22) See *Robson v. Bennett*, post, p. 242. n. (50).

(23) *Parker v. Gordon*, 7 East's Rep. 385. The drawee accepted the bill, payable at Davison and Co.'s, his bankers: at the part of the town where Davison and Co. lived, bankers shut up at six o'clock. The bill was not presented for payment until after six, when the shop was shut up, and the clerks gone.

custom of that place, all persons of his description begin and leave off business at stated hours.

But to an acceptor not so circumstanced (24),

In an action against the drawer, Lord Ellenborough held that this was not a good presentment, and nonsuited the plaintiff; and on motion for a new trial, the court held, that if a party took an acceptance payable at a banker's, he bound himself to present the bill during the banking hours; and therefore rule refused.

N. Lawrence and Le Blanc Js. said, the holder was not bound to take such an acceptance.

Elford v. Teed, 1 Maule and Selw. 28. The drawee accepted a bill, payable at his banker's, Hodson and Co.; the only evidence of a presentment was by a notary's clerk, between half after six and seven, in the evening: the banking-house was then shut, and the answer at the private door was "no orders." Lord Ellenborough allowed plaintiff to take a verdict, with liberty to defendant to move to enter a nonsuit; rule nisi: and on cause shown, the Court thought this presentment too late: that it furnished no ground for presuming that there had been a prior presentment by the holder within the banking-hours: but, that plaintiff might have an opportunity of proving such a presentment, they allowed him to have a new trial on his paying the costs. See, however, *Garnett v. Woodcock*, post.

(24) *Barclay v. Bailey*, 2 Campb. N. P. C. 527. This was an action against the drawer of a bill. At eight o'clock in the evening of the day on which it became due, it was presented at the house of the acceptor in London, for payment; and the answer given was, that the acceptor had become bankrupt, and had removed into another quarter of the town. It was, however, proved that a person had been stationed at the house from nine o'clock till four, for the purpose of taking up this bill, but that it was not presented within those hours. Lord Ellenborough held, that the acceptor being a common trader, not a banker, the presentment was good; and said, that eight o'clock in the evening could not be considered an unseasonable hour

eight o'clock in the evening is not an unseasonable hour for making a presentment for payment.

And no objection can be made to a presentment on the ground of its being at an unseasonable hour, if a person were stationed there at the time to give an answer. (25)

Therefore a presentment at a banker's out of the usual hours will be unobjectionable, if the banker, or any agent on his behalf, were there at the time of such presentment. (25)

A presentment for acceptance is not (26) neces-

for demanding payment at the house of a private merchant who had accepted a bill. Verdict for the plaintiff.

Morgan v. Davison, 1 Stark. 114. A bill, made payable at Herring and Co.'s (not bankers), Copthall-court, was presented there between six and seven in the evening, the day it became due; there was only a girl there, who was left to take care of the counting-house. In action by indorsee against drawer, Lord Ellenborough held this a sufficient presentment, the hour being one at which the holder might reasonably expect to find the party in his counting-house.

(25) *Garnett v. Woodeock*, 1 Stark. 476. 6 M. & Selw. 41. In an action against the acceptor, on a bill made payable in London, and accepted payable at Dennison and Co.'s, plaintiff proved a presentment at Dennison and Co.'s between seven and eight o'clock in the evening, and that a boy returned for answer "no orders." It was insisted that this presentment, being at a London banker's, was at an unseasonable hour; but Lord Ellenborough said, if the banker appointed a person to attend to give an answer, a presentment at any time whilst that person was in attendance would be sufficient. Plaintiff had a verdict, and a rule to set it aside was refused. But see *Elford v. Fred*, ante, note (23).

(26) *Molloy*, B. 2. c. 10. § 16. "If a bill is drawn upon a merchant in London, payable to I. S. at double usance, I. S.

sary, except upon bills payable within a limited time after sight.

No (27) certain time is fixed within which this presentment must be made, but it should (28) be made within a reasonable time.

What shall be deemed a reasonable time must depend upon the particular circumstances of each case.

Keeping it a whole day, exclusive of the day of receiving it, without negotiating it or sending it for acceptance, is not necessarily an unreasonable delay. (29)

“is not bound in strictness of law to procure an acceptance, but only to tender the bill when the money is due.”

Beawes, § 266. p. 453. “There is no obligation to procure acceptance to a bill payable at a day certain, as the time goes on, whether accepted or not; but it is otherwise with bills payable at so many days’ sight.” See also *Mar. 12, 13.* and *Blesard v. Hirst*, and *Goodall v. Dolley*, post.

Indeed, in all cases where a bill is remitted to a factor or agent, it may be his duty to apply for an acceptance, and he may be answerable for any loss his principal may suffer by a neglect; but this neglect does not affect the bill, if payable otherwise than after sight, nor the principal’s right thereon. Vide *Beawes*, § 49. p. 420. *Mar. 12, 13.*

(27) Per *Eyre C.J.* and *Heath J.*, *H. Bl.* 569, 570.

(28) Per *Eyre C.J.*, *2 H. Bl.* 569.

(29) *Fry v. Hill*, *7 Taunt.* 397. Plaintiff took a bill at Windsor on Friday, payable in London a month after sight. What he did with it did not appear, but it was not presented for acceptance till Tuesday: it was left to the jury whether there was a default to present within a reasonable time, and they found for plaintiff; and on motion for new trial, the court said, it would still be a question for the jury whether there had been a

No delay warranted by the common course of business is improper, nor is any delay which is occasioned by keeping the bill in (30) circulation at a distance from the place where it is payable; but a delay by locking it up for any unreasonable length of time, is. (31)

What might be deemed delay as to one species of bill, may not be so as to another. (32)

Therefore, bills drawn by a country banker upon his London correspondent may be entitled to longer indulgence than ordinary bills, because they may be wanted for country use as part of the circulating medium of the country. (32)

And a person who has himself kept such bills several days, shows by his conduct that he does not consider them as requiring immediate presentment. (32)

presentment in reasonable time: and as they had passed their judgment on that point, rule refused.

(30) See *antè*, n. (28).

(31) Per Buller J., 2 H. Bl. 170. See *Muilman v. D'Eguino*, *infra*, note (33).

(32) *Shute v. Robins*, 1 Moody & Malkin, 133. 17th November, plaintiffs traveller received from defendants, bankers at Liskeard, a bill for 100*l.*, at twenty days after sight, drawn by the Plymouth bank upon their London banker. Defendants held the bill some days before they paid it to the traveller. The traveller used to transmit weekly to plaintiffs what securities he received; and he transmitted this to plaintiffs, who lived at Bristol, 24th November. It did not reach Bristol till after post time on Friday 25th. Plaintiffs sent it to London on Monday 28th, and it was presented for acceptance the 29th. The Plymouth bank stopped on the 24th, and none of their bills

If a bill payable abroad at a certain time after sight be taken in a course of negotiation (33), it is

were honoured by the London house after the 26th. Acceptance was refused, and defendants insisted they were discharged. Lord Tenterden said, the question was whether plaintiffs, or their servant, used due diligence. The bill was certainly a considerable time in their and their traveller's hands; but, in considering whether there had been unreasonable delay, they must look to the character of the bill, and the course of dealing, as far as they could collect it, with regard to such bills. It was a bill by a country banker upon his London banker, and it did not seem unreasonable to treat such bills as not requiring immediate presentment, but as being retainable by the holders for use within a moderate time as part of the circulating medium of the country; and defendants, by the time they kept it, showed they so considered this bill: however, it was for the jury to say whether they thought the delay unreasonable or not, and they would find their verdict accordingly. The jury found for the plaintiffs.

(33) *Muilman v. D'Eguino*, 2 H. Bl. 565. In debt, on bond conditioned to pay certain bills drawn on India at sixty days after sight in case they should be returned protested, defendant pleaded that they were not presented for acceptance within a reasonable time after the drawing: it appeared that they were drawn 5th of March, 1793; that they were indorsed on that day by defendant to plaintiffs, who procured them for a house at Paris; that plaintiffs sent immediate advice to the house at Paris, and on receiving their directions on 30th of April, sent them to India, where they arrived the 3d of October; on the 5th of October, the holder wrote to the drawee, who was from home, desiring him to accept the bills, and on the 17th of October, he sent an answer of refusal: some of the bills were thereupon protested 29th of October, and the rest 18th of November. Eyre C. J. left the case to the jury; but told them, he thought the bills had been sent to India in time, as they were put up here for negotiation, and were therefore liable to be delayed, and that they were presented in India in time after

not necessary to send it by the first opportunity to the place where it is payable.

their arrival. The jury found for the plaintiff; and on a rule to show cause why there should not be a new trial, and cause shown, the Court was satisfied with the verdict, and plaintiff had judgment. Eyre C. J. said, "It is not necessary to lay down any new rule as to bills of exchange payable at sight, or within a given time afterwards; if it were, I should feel great anxiety not to eulogize the negotiation of bills circumstanced like these. It would be a very serious and difficult thing to say, that a person buying a foreign bill, in the way these were bought, should be obliged to transmit it by the first opportunity to the place of its destination. There would also be a great difficulty in saying *at what time* such a bill should be presented for acceptance. The courts have been very cautious in fixing any time for presenting for acceptance an inland bill, payable at a certain period after sight; and it seems to me more necessary to be cautious with respect to a foreign bill payable in that manner. I think, indeed, the holder is bound to present the bill in reasonable time, in order that the period may commence from which the payment is to take place; but the question, what is reasonable time, must depend on the particular circumstances of the case; and it must always be for the jury to determine whether any laches are imputable to the plaintiff." Per Buller J. "The only rule I know of, which can be applied to the case of bills of exchange, is, *that due diligence must be used*. Due diligence is the only thing to be looked at, whether the bill be foreign or inland, and whether it be payable at sight, at so many days after, or in any other manner. But I think a rule may thus far be laid down as to laches, with regard to bills payable at sight, or a certain time after sight, namely, that they ought to be put in circulation; and if a bill drawn at three days' sight were kept out in that way for a year, I cannot say there would be laches; but if, instead of putting it in circulation, the holder were to lock it up for any length of time, I should say that he would be guilty of laches; but farther than this,

Upon a presentment for acceptance, the bill should be left with the drawee (34) twenty-four hours, unless in the interim he either accept or declare a resolution not to accept.

But a bill or note must not be left (unless it be paid) on a presentment for payment; if it be, the presentment is (35) not considered as made until the money is called for.

"no rule can be laid down." Per Heath J. "No rule can be laid down as to the time for presenting bills payable at sight, or at a given time afterwards. In the French ordinances of 1673, in Postlethwaite and Marius, it is said, 'That a bill payable at sight or at will is the same thing.'"

Goupy v. Harden, Holt, 342. 7 Taunt. 159. 2 Marsh. 454. A bill drawn in London, 12th May, 1815, at thirty days after sight, on a house at Lisbon, was remitted by defendant to plaintiff at Paris. Plaintiff indorsed it to a house at Genoa; they negotiated it; and it was not till 22d August that it reached Lisbon, and was presented for acceptance: before that time, viz., on 15th July, the drawer failed, and on that account acceptance was refused. It was urged for defendant, that it was unwarrantable in plaintiff to send the bill to Genoa, instead of transmitting it to Lisbon for acceptance; but Gibbs C. J. thought otherwise; and the jury said such a bill might be sent round the world before it was presented for acceptance; and found for the plaintiff. On motion for a new trial, Gibbs C. J. relied upon *Muilman v. D'Eguino*, in which, he said, the point had been deliberately considered, and he was clearly of opinion that the plaintiff had not taken the risk upon himself by sending the bill into circulation; and the jury having been of opinion that the bill had been presented in reasonable time, a rule was refused.

(34) Vide Mar. 2d ed. 16. Moll. b. 3. c. 5. § 1. Lord Raym. 281.

(35) *Hayward v. Bank of England*, Str. 550. Hayward kept cash at the bank, and paid in a banker's note; the runner to:

The time when a presentment for payment must be made, depends upon the time when the bill or note is payable.

A bill or note payable on demand must not be kept locked up; if it be, the loss will fall on the holder. (36)

And it will be no excuse that it would not have been paid had it been presented sooner. (36)

If A. take a bill or note payable to bearer on demand for a pre-existing debt, and, instead of putting it into circulation or presenting it for payment in a reasonable time, keep it by him, and such bill or note be afterwards dishonoured, the debt will be considered as extinct, and the loss will fall upon A. (37)

the bank left it at the banker's the next morning, and called for the money in the afternoon, but in the interval the banker had stopped; and though this appeared to be the usual practice at the bank, King C. J. said, it was dangerous to suffer persons to deal with notes in that manner, and that the Common Pleas were of that opinion in the like case; and he directed the jury to find for the plaintiff, which they did. *Sed vide Turner v. Mead, and Hoar v. Da Costa*, post, p.238.

(36) *Breching v. ———*, Holt, 315. Plaintiff took of defendant at Tunbridge, on the 5th, before the Maidstone post went out, a 20*l.* Maidstone bank note, payable on demand; he kept it till the morning of the 7th, and then sent it by the carrier, who reached Maidstone at nine in the morning of the 7th; the post of the 6th reached Maidstone an hour sooner; the bank did not open that day: Gibbs C. J. held there was laches in plaintiff, and he directed a nonsuit.

(37) *Camidge v. Allenby*, 6 Bar. & Cr. 373. 10th December at 3 p.m. defendant gave plaintiff four 5*l.* notes, payable to

And it will make no difference, though the person, by whom the bill or note was to be paid, had stopped payment, and would not have paid it if presented. (37)

Unless it could also be shown that the person giving the bill or note to A., knew that the person to pay it had stopped payment, so as to make it a fraud in him to give it to A. (37)

The party giving such a bill or note is entitled to have it promptly put into circulation or presented, that he may have the better chance of an early notice that the party who ought to pay has stopped; and then he may judge for himself whether he will sue such party; and if he be in time to call upon the person from whom he took the bill or note, he may call upon him accordingly. (37)

bearer on demand, of the bank at Huddersfield of Dobson and Co. They were given for oats plaintiff sold that day to defendant. At 11 o'clock that day Dobson and Co. stopped payment, but neither plaintiff nor defendant knew it. The notes were given to plaintiff at York, 40 miles from Huddersfield; and plaintiff lived at Laythorn, 52 miles from Huddersfield. Plaintiff did not circulate the notes, nor present them for payment; but, on 17th December, he required defendant to take them back. Defendant refused, and plaintiff sued him for the price of the oats. A special case was reserved; and on argument, the three judges were clear that defendant had made the notes his own, and the debt was to be considered as discharged; had he given defendant prompt notice, defendant might have resorted to the parties from whom he had the notes, and at all events he might have sued Dobson and Co. upon the notes. *Postea* to defendant.

A bill or note payable on demand, is payable immediately upon presentment; and unless put into circulation, must be presented within a reasonable time after the receipt.

It has (38) not been expressly decided whether what shall be considered as a reasonable time is to be taken as a question of fact for the determination of the jury, or as a question of law for the determination of the court. In *Darbishire v. Parker* (39), Lawrence J. intimated very decidedly

(38) Vide *antè*, *Muilman v. D'Eguino*, p. 229. note (33). *Tindal v. Brown*, post, p. 256. note 82. *Appleton v. Sweetapple*, post, p. 239. note (46). *Hankey v. Trotman*, post, p. 240. note (48); and *Hilton v. Shepherd*, *Hopes v. Alder*, and *Darbishire v. Parker*, *infra*, note (39).

(39) Whether it is the province of the judge, or of the jury, to decide upon the reasonableness of notice, has never been expressly determined. In *Tindal v. Brown*, post, p. 256. note 82. Lord Mansfield considered it as a question partly of fact and partly of law: *Ashurst and Buller Js.* as a question of law. In the two cases of *Hilton v. Shepherd*, and *Hopes v. Alder*, 6 East's Rep. pp. 14. 16. note, Lord Kenyon considered it as a question for the jury, under all the circumstances of accident, necessity, and the like. But the judgment of Lawrence J., in *Darbishire v. Parker*, shows it was his decided opinion that it was an inference of law, to be drawn by the court from the facts, which (as in all other cases) were to be found by the jury.

Darbishire and another v. Parker, 6 East's Rep. 3. The plaintiffs received at Manchester notice of the dishonour of a bill, between eight and nine o'clock in the morning of the 12th of August. The post from Manchester to Liverpool, where the drawer resided, set off between twelve and one o'clock at noon. They, however, sent no notice by the post of that, or of the next day, but sent it by a private hand on the 13th, by which it was delivered about nine o'clock at night, two hours later than it

that it was a question of law for the judges, and

would have arrived had it been sent by the post. Lord Ellenborough left it to the jury, whether reasonable notice had been given, and they found for the plaintiffs. A new trial was moved for, on the ground of a misdirection, and a rule nisi granted. The Court, without tenting into the general question, held that the case deserved reconsideration; inasmuch as the plaintiffs appeared, at all events, to have been guilty of laches, whether the notice should have been sent by the post of the 12th or by that of the next day, — having failed in doing either. Rule absolute. In this case, Lawrence J. on the general question, whether reasonable notice be a question of law or of fact, said, "It must be recollected, that the facts stated in the report of *Tindal v. Brown* were afterwards found in a special verdict, in which the jury did not find whether the notice were reasonable or not; on which special verdict this Court gave judgment for the plaintiff, and that judgment was unanimously confirmed in the Exchequer chamber. But if reasonable notice were a question of fact, and not of law, I am at a loss to know how those judgments are to be sustained; for, the jury did not find the fact of reasonable notice, but left that as a question of law to be inferred from all the circumstances. But if it were a question of fact, there ought to have been a *venire de novo* in that case." In *Ball v. Wardell*, Willes, 204. 206. where a custom was pleaded for the inhabitants of a town to walk and ride over a certain close of the plaintiff's at all *seasonable* times, what was to be deemed a *seasonable* time was considered to be a question of law, arising out of all the circumstances; of which Lord C. J. Willes says, "the Court were the proper judges, as in the case of *reasonable time*, *reasonable fines*," &c. "For," he adds, "what is contrary to reason cannot be consonant to law, which is founded on reason; and therefore the reasonableness in these and the like cases depends on the law, and is to be decided by the judges." And in the same case he says, "issues may be joined on things which are partly matters of fact, and partly matters of law; and then, when the evidence is given at the trial, the judge must direct the jury how the law is; and if they find con-

yet in many instances since it has been treated as a question of fact for the jury. (40)

Upon a bill or note payable on demand or at sight, and given for cash by a person who makes the profit by the money on such bills or notes a source of his livelihood, it is difficult to say what length of time such person shall be entitled to consider unreasonable; but, upon such bills or notes given by way of payment or paid into a banker's, any time beyond what the common course of business warrants (41), is unreasonable.

Upon a bill or note of this kind given by way

"trary to such direction, it is a sufficient reason for a new trial."

See also *Anderson v. Royal Exchange Assurance Company*, 7 East's Rep. 43., in which Lord Ellenborough, in speaking of the time within which the assured may abandon the property insured, says, "an abandonment must be made within a reasonable time; and I rather conceive that it is the province of the judge to direct the jury as to what is a reasonable time under the circumstances." See also *Bateman v. Joseph*, post. See also Co. Litt. 56. b. "Reasonable time shall be adjudged by the discretion of the justices before whom the cause dependeth: and so it is of reasonable fines, customs, and services, upon the true state of the case depending before them; for reasonableness in these cases belongeth to the knowledge of the law, and therefore to be decided by the justices. For nothing that is contrary to reason is consonant to law." See also *Appleton v. Sweetapple*, post, p. 239.

(40) See *Fry v. Hill*, antè, p. 227. note (29), and *Goupy v. Harden*, antè, p. 231. *Shute v. Robins*, antè, p. 228. *Hoar v. Da Costa*, post, p. 238., and *Manwaring v. Harrison*, post, p. 238.

(41) See *Turner v. Mead*, *infra*, note (42).

of payment, the course of business seemed formerly to allow the party to keep it, if payable in the place where it was given, until the (42) morn-

(42) *Ward v. Evans*, *Ld. Raym.* 928. A banker's note was paid to the plaintiff's servant at noon, and presented for payment the next morning, at which time the banker stopped payment. On a case reserved, the Court held it was presented in time; and judgment was given for the plaintiff.

Moor v. Warren, *Str.* 415. The defendant gave the plaintiff a banker's note at two o'clock in the afternoon, and he tendered it for payment the next morning at nine: the banker stopped a quarter of an hour before; and *Pratt C. J.* told the jury the loss should fall on the defendant, there being no laches in the plaintiff, who had demanded the money as soon as was usual in the course of dealing, and that keeping the note till next morning, could not be construed giving a new credit to the banker; and the jury found for the plaintiff. In *Holmes v. Barry*, *Str.* 415. the circumstances were the same; and *King, C. J.* of the Common Pleas, gave a similar direction, and the jury found accordingly.

Fletcher v. Sandys, *Str.* 1248. A banker's note was paid to the plaintiff after dinner, and he sent it for payment the next morning, but the banker had stopped payment; and *Lee C. J.* ruled that there was no laches in the plaintiff, and that in all these cases there must be a reasonable time allowed, consistent with the nature of circulating paper.

Turner and others v. Mead, *Str.* 416. The defendants paid the *Sword Blade Company* (the plaintiffs) two banker's notes, at three o'clock in the afternoon; and the next morning their servant left them at the banker's, in order to call for the money in the evening, it then being the custom with the plaintiffs and the bank to send out their notes in the morning and to call for the money in the afternoon. The plaintiffs' servant called for the money between four and five in the afternoon, and the banker had just stopped payment; and because the plaintiffs had done nothing more than was usual in leaving the notes in the morning without taking the money, *Pratt C. J.* directed the

ing of the next day of business after its receipt; and till the next post, if payable elsewhere; but (43) not longer.

jury to find for them, which they did. Sed vide *Hayward v. Bank of England*, ante, p. 231.

Hoar v. Da Costa, Str. 910. The defendant paid the plaintiff a banker's note at twelve: he put it into the bank at one, and at ten the next morning the runner from the bank carried it with other notes, and left them, as was then usual, to call again for the money: he called at eleven, and was told the banker's servant was gone to the bank: he called again at two, when the banker said he was going to stop, and refused payment; but he paid small notes till four o'clock. The plaintiff gave notice to the defendant the next morning: the question was, whether this note was payment to the plaintiff. It was insisted for the defendant, that if the note had been tendered by itself it would have been paid; and for the plaintiff, that if there had been no demand there would have been no laches, it being within a day after the receipt that the banker stopped. *Raymond C. J.* said there was no standing rule, and left it to the jury, who found for the plaintiff.

(43) *Manwaring v. Harrison*, Str. 508. On Saturday the 17th of September, about two o'clock, *Harrison* gave *Manwaring* a banker's note, dated the 5th of September, and payable to *Harrison* or order on demand; *Manwaring* paid it away the same afternoon to *J. S.*, who presented it for payment on the Tuesday morning as soon as the shop was open: but the banker stopped payment at that time. *Manwaring* paid the money to *J. S.*, and brought this action to recover it from *Harrison*. *Pratt C. J.* left it to the jury, whether there had been any neglect; and observed, that as *Harrison* had kept it eleven days, he probably would not have demanded payment sooner than *J. S.* did. The jury wished to leave it to the Court whether there had been a reasonable time; but the Chief Justice told them they were the judges of that; upon which they found for the defendant, and gave it as their opinion, that a person who

Thus, where a note of this kind, payable in London, was given there in the morning, a presentment the next morning was held (44) sufficiently early; a presentment at two the next afternoon too (45) late.

In (46) a later modern case, where a similar note was given in London at one, and not presented till the next morning, three juries held the delay unreasonable, but it was against the opinion of the Court.

did not demand a banker's note in two days, took the credit on himself.

East India Company v. Chitty, Str. 1175. At half past eleven in the morning of the 18th of January, the defendant paid the East India Company's cashier a banker's note, and they did not send it for payment till the next day at two, at which time the banker stopped payment. The question was, who should bear the loss? and upon examining the merchants, it was held, that the company had made it their own by not sending it out the afternoon they received it, or at furthest the next morning; and the jury found accordingly for the defendant.

(44) *Ward v. Evans*, *Moore v. Warren*, *Holmes v. Barry*, *Fletcher v. Sandys*, *antè*, p. 237. note (42).

(45) *East India Company v. Chitty*, *suprà*.

(46) *Appleton v. Sweetapple*, B. R. Mich. 23 Geo. 3. A bill payable in London on demand was given to the plaintiff in London at one o'clock in the afternoon, and he did not present it till the next morning; the question was, whether he presented it in time? Lord Mansfield left the point to the jury, who found for the defendant; but the Court granted a new trial, because the question was a matter of law upon which the judge should have decided; the jury found again for the defendant, but against the judge's direction; a second new trial was granted, and the jury again found for the defendant; and then the Court refused to interfere.

But in a more recent case, where such a note payable in London was given in the country, it was held that the person receiving it was not bound to send it to London till the following day. (47)

And that the person receiving it in London was not bound to present it till the next day. (47)

A bill or note of this kind, given by way of payment to a banker, must (48) be presented by him

(47) *Williams v. Smith*, (1819,) 2 Barn. and Ald. 496. At ten o'clock on Friday morning, defendant paid plaintiff, at Wantage, (eighteen miles from Newbury,) 450*l.* in Newbury bank notes, payable at Newbury or in London: plaintiff sent them to the Wantage bank the same day, to remit to London, but they declined on account of the risk, and halves of them were sent to London by Saturday's coach, and the other halves by Sunday's post: they were presented for payment on the Tuesday, but no Newbury notes were paid in London after the Monday, nor at Newbury after the Saturday. Newbury was a two-days' post from Wantage, and the post from London left Wantage at half after five in the evening: on case, it was urged for defendant, that plaintiff should have sent the notes to London by the Friday's post, or if not, that they should have been presented for payment the day they arrived in London, in either of which cases they would have been paid; but the Court held, that plaintiff had till the day after they were received, i. e. till Saturday, to send them to London, and the banker there had till the day after he received them, i. e. till Tuesday, to present them: and *postea* to plaintiff.

(48) *Hankey v. Trotman*, Blackst. 1. The plaintiff was a banker, and had a bill on the defendant, for which the defendant paid him a draft upon another banker at twelve at noon, and the plaintiff got it marked for acceptance that night; before the next morning the banker on whom it was drawn stopped. The question was, whether the plaintiff or defendant should bear the loss? The jury found a verdict for the

as soon as if it had been paid into his hands by a customer.

And it has been held, that a bill or note of this kind, if payable at the place where the banker lives, must be presented the next time the banker's clerk goes (48) his rounds.

But, if a London banker receive a check by the general post, he is not bound to present it for payment (49) until the following day.

defendant, and upon a rule to show cause why there should not be a new trial, and cause shown, the Court (Wright J. dubitante) held that it was a question of fact, whether the plaintiff had sufficient time for receiving the money, of which the jury were the proper judges; and the verdict stood.

But see the cases of *Rickford v. Ridge*, and *Robson v. Bennett*, in the two following notes. In the last-mentioned case, Mansfield C. J. said, that *Hankey v. Trotman* had been overruled by *Appleton v. Sweetapple*. See 2 Taunt. 394.

(49) *Rickford and others v. Ridge*, 2 Campb. N. P. C. 537. The plaintiffs, bankers at Aylesbury, gave the defendant cash for a check upon Smith and Co., bankers in London; and in an action to recover this money, it appeared that they took the check on the 13th of June, but, instead of sending it to London by the post of that day, which they might have done, they sent it by a morning coach on the 14th; and their bankers, to whom it was directed, received it between three and four o'clock on the same day, and presented it at Smith's house at noon on the 15th, when payment was refused. It was proved that bankers to the west of St. Paul's, where the plaintiffs' bankers resided, sent out checks and bills for payment only once in the day, and that generally before the arrival of the post; and therefore such as arrived by the post on one day generally remained with them until the following morning; so that had this check arrived by the post on the 14th, it would not have been presented until the 15th. The question therefore was, whether such practice was

And where a person in London received a check upon a London banker between one and two o'clock, and lodged it soon after four with his banker, and the latter presented it between five and six, and got it marked as a good check, and the next day at noon presented it for payment at the clearing house; the Court held that there had been no unreasonable delay, either by the (50) holder in not presenting it for payment on the first day, which he might have done, or by his (50) banker in pre-

reasonable. It was admitted that a different practice prevailed to the east of St. Paul's. Lord Ellenborough said, he could not hear of any arbitrary distinction between one part of the city and another: in towns where posts arrived at different hours, it would be impossible, or at least unreasonable, to require that bankers should present bills and checks on the same day on which they were received: the practice here proved, that checks received in the course of one day should be presented on the following day, appeared to him to be subservient to general convenience, and consistent with the law of merchants, which merely required checks to be presented with reasonable diligence. Verdict for the plaintiffs.

(50) *Robson v. Bennett*, 2 Taunt. 388. On the 11th of September, between one and two o'clock, the defendants gave the plaintiffs a check upon Bloxam and Co., their bankers, in payment for goods. The plaintiffs lodged the check with Messrs. Harrisons, their bankers, a few minutes after four; and they presented it between five and six to Bloxam and Co., who marked it as good. It was proved to be the usage among London bankers, not to pay any check presented by or on behalf of another banker after four o'clock, but merely to mark it if good, and pay it the next day at the clearing house. On the 12th at noon, Harrisons' clerk took this check to the clearing house; but no person attended for Bloxam and Co., who stopped payment at nine on that morning, and the check was

sending it at the clearing house only, on the following day at noon: it being proved to be the usage among such bankers, not to pay checks presented by one banker to another after four o'clock, but only to mark them if good, and to pay them the next day at the clearing house.

If a man take a bill on the eve of its becoming due, and it be payable at a distant place, he must not keep it by him so as to prevent its being presented for payment on the day it becomes due. (51)

And if he take it so near the time of its becoming due, that it will be impossible to present it on the day it becomes due, he must lose no time in forwarding it, or putting it into circulation, so that it may be presented without delay. (51)

therefore treated as dishonoured. The plaintiffs in going with the check to Harrisons' passed Bloxam's house. On a case stating these facts, the Court held, that there had been no laches in the plaintiffs in not presenting the check to Bloxam and Co. on the 11th for payment; or in his bankers, in not presenting it at the banking-house but merely at the clearing house; and therefore gave judgment for the plaintiffs.

See also *Reynolds v. Chettle*, 2 Campb. N. P. C. 596.

(51) *Anderton v. Beck*, 16 East, 248. 26th December plaintiff received in Yorkshire a bill payable in London, 28th; he kept it till the 29th, and then sent it to the Lincoln bank, who forwarded it to London without delay, and it was received in London and presented for payment 2d January; plaintiff had no correspondent in London; the bill was dishonoured, and in an action for goods sold, the question was, whether this bill was payment? Bayley J. thought it was, and verdict for defendant; and on motion to enter verdict for plaintiff, the Court held, that as plaintiff submitted to take this bill, he was bound to use due

If a bill be payable at either of two places, the person taking it has the option at which to present it; and it cannot be imputed as laches in him that he presented it at the most distant, and that if he had presented it at the other it would have been paid. (52)

A (53) bill or (54) note importing to be payable

diligence in presenting it, and that he had been guilty of laches in keeping it from the 26th to the 29th; he might have sent it off the 27th or 28th. Rule refused.

(52) *Beeching v. Gower*, Holt, 313. Plaintiff took of defendant at Tunbridge, on 5th March, a 10*l.* Kentish bank note, payable on demand at Maidstone, or at Messrs. Ramsbottom's, London. Plaintiff sent the note to London the same day, and it was presented at Ramsbottom's on the 6th, but they ceased paying that day; the Kentish bank paid all the 6th, so that had it been sent to Maidstone it would have been paid: defendant insisted that plaintiff ought to have sent it to Maidstone, which was nearer, and where plaintiff had a clerk; Gibbs C. J. was clear that, as the note was payable at either place, plaintiff had his option at which to present it; and verdict for plaintiff.

(53) *Coleman v. Sayer*, 1 Barnard. B. R. 303. In an action upon an inland bill payable six days after sight, one question was, whether three days' grace are allowed where a bill is payable at certain days after sight, as well as where it is payable upon sight? and Raymond C. J. said they were allowable in one case as well as in the other. Another question was, whether they were allowable upon inland as well as upon foreign bills? and the common serjeant and foreman of the jury said it was the constant practice in the city to allow them in both cases; upon which Raymond C. J. said he would not alter it; but the plaintiff was nonsuited on another point.

(54) *Brown v. Harraden*, 4 Term Rep. 148. In an action on a note dated the 13th of September, 1789, and payable the 2d of November, the declaration stated a presentment and refusal

within a limited time after a certain event, or on a given future day (54), or (55) at sight, is not in fact payable until (56) two days after the expiration of that time, nor, unless the third be a day of public rest, until (56) three.

These extra days are called days of grace.

Different (57) countries vary in the number of days allowed by way of grace; and in two cases

on the 2d of November. The defendant pleaded a tender on the 5th, and the plaintiff replied a bill of Middlesex sued out the 4th: rejoinder, that defendant was not liable to pay the note at the time the bill of Middlesex was sued out, and sur-rejoinder that he was. Demurrer and joinder. The question therefore was, whether three days' grace were to be allowed on promissory notes? and after argument the Court was unanimous that they were. The same point was taken for granted in *Smith v. Kendall*, antè, p. 34. note (73). See *Dexlaux v. Hood*, Bull. Ni. Pr. 274. *Ward v. Honeywood*, Dougl. 62. *May v. Cooper*, Fort. 376.

(55) See *Coleman v. Sayer*, antè, note (53), and in *Janson v. Thomas*, antè, p. 98. note 22. Buller J. mentioned a case before Willes C. J. in London, in which a jury of merchants was of opinion that the usual days of grace were to be allowed on bills payable at sight. But see Poth. pl. 12. 172. 198.

(56) *Tassell v. Lewis*, Lord Raym. 749. "In case of foreign bills of exchange, the custom is, that three days are allowed for the payment of them; but if it happens that the last of the three days is a Sunday, or great holiday, as Christmas-day, &c. upon which no money used to be paid, there the party ought to demand the money upon the second day, otherwise it will be at his own peril." Merchants in evidence swore this to be the custom of merchants, and it was approved by Holt C. J. See also 2 Bl. Com. 469. Mar. 2d ed. 25.

(57) *Beawes*, § 260. 1st ed. p. 449. The number allowed by the Hamburg ordinance, art. 16, is twelve.

some years ago it was proved (58), that at Hamburg the holder of a bill is not bound to present it until the eleventh day after the time limited for its payment, where the eleventh is a post day ; that if the eleventh be not a post day, he must present it the next preceding post day ; but that (59) if

(58) *Goldsmith and another v. Shee*, C. P. cor. Lord Eldon, 20th of December, 1799. A bill for 500*l.* drawn on Katter at Hamburg, at three usances, was dated the 25th of June, 1799; it was presented for payment on the 4th of October, which was a post day. In an action by the indorsees against the payee, the defence was, that the presentment was improper ; but it was proved in evidence as the settled usage at Hamburg, that, although it is usual to pay bills on the day they become due, the holder may, if he please, keep them a certain number of days, called respite days ; and that the number of respite days is eleven where the eleventh is a post day ; but where the eleventh is not a post day, the respite days extend to the preceding post day only, the holder being obliged at his peril to protest, and send off the protest by the eleventh day. Verdict for the plaintiffs.

But this is not consistent with the Hamburg ordinance, art. 17. ; in which it is stated that the holders may postpone the protest until the twelfth day, if it be not a Sunday or holiday.

(59) *Goldsmith and another v. Bland and another*, C. P. cor. Lord Eldon, 1st of March, 1800. A bill for 998*l.* 9*s.* 9*d.*, drawn on Treviramus of Bremen, but payable in Hamburg at three months, was dated the 15th of June, 1799 ; it was not presented or protested until the 26th of September, which was not a post day : another bill for 261*l.* 7*s.* 2*d.* addressed to Voeg, in Lubeck, payable in Hamburg at three months, was dated the 26th of June, 1799 ; it was not presented or protested until 7th of October, which was not a post day. In an action on these bills against the defendants as indorsers, it was proved that it was optional in the holder of a bill at Hamburg, whether he would present and protest it on the post day before the

the drawee reside not at Hamburg, but at Lubeck or Bremen, or other place near Hamburg, and in daily intercourse with it, the holder need not present it until the eleventh day, although the eleventh be not a post day,

In this country, upon the last day of grace, and within a reasonable time before the expiration of that day, a bill or note must be presented for payment.

But, if the holder make a second presentment on that day, the drawer or maker is (60) entitled to insist on paying it when such presentment is made, without paying the fees of noting or protesting, although such presentment be made after the banking hours, and for the purpose of noting and protesting.

A presentment on the second day of grace, where the third is not a day of public rest, is a (61) nullity.

eleventh day after the day limited for its payment, the eleventh not being a post day, or whether he would keep it until the eleventh : and one witness proved, that where the drawee lived at Lubeck or Bremen, it was the constant usage to keep the bill until the eleventh, whether it was a post day or not, there being posts from Lubeck and Bremen to Hamburg every day. Verdict for the plaintiffs for 1633*l*. See the preceding note.

(60) *Leftley v. Mills*, post, p. 261. note (88).

(61) *Wiffen v. Roberts, Espinasse*, 261. A bill was dated 1st November, 1798, and payable three months after date : in an action against the drawer, it appeared that the only presentment for payment was on the 3d of February, which was only the second day of grace, and the day following was not a day of public rest ; and Lord Kenyon held, that the non-payment by the acceptor the day before the bill became regularly

Where the third is a day of public rest, the second is the proper day.

The days of public rest in England are, Sundays, Good Friday, Christmas-day, and every day appointed by proclamation for a solemn fast or day of thanksgiving. (62)

Upon a bill or note payable within a limited time after sight, the time must be computed from its (63) presentment for acceptance; and upon a bill or note payable within a limited time after the date, where it has no date, from (64) the day it issued.

The calculation of the time depends upon the different modes of computing time.

All place, swith which we are in the habit of negotiating bills, compute their time, as we do,

due, was not such a default in him as could authorise the holder to have recourse to the drawer, and the plaintiff was nonsuited.

(62) 39 & 40 G. 3. c. 42. 7 & 8 G. 4. c. 15. § 1 & 2.

(63) Beawes, § 252. 1st ed. p. 447.; but Mar. 2d ed. p. 19. says, "from the day of acceptance, or protest for non-acceptance." By the Hamburg ordinance, art. 26. "If a bill of exchange, at or after sight, should not be accepted immediately on its being presented, but it should be done afterwards, such acceptance is to be considered as made on the first day of *presentment*." Pothier, pl. 13. says, "from the day of presentment and acceptance." See *Campbell v. French*, 6 Term Rep. 200.

(64) *Armitt v. Breame*, Lord Raym. 1076. An award which directed the removal of some scaffolds within fifty-eight days from the date of the award, had no date; and an objection being taken upon this ground, the Court said that the time was to be computed from the delivery. *Giles v. Bourne*, post.

(except that Russia adheres to the old style) by years reckoned in a series from the birth of our Saviour, and divided each into twelve months, and 365 (or in every fourth year 366) days.

Upon a bill drawn at a place using one style, and payable at a place using the other, if the time be to be reckoned from the date, it shall be computed according to the style of the place at which it was drawn; otherwise according to (65) the style of the place where it is payable; and in the former case the date (66) must be reduced or carried forward to the style of the place where the bill is payable, and the time reckoned from thence.

Thus, on a bill dated the 1st of May, old style, and payable here two months after date, the time must be computed from the corresponding day of May, new style, viz. May 13th; and on a bill dated the 1st of May, new style, and payable at St. Petersburg two months after date, from the corresponding day of April, old style, viz. April 19th.

Where the time after the expiration of which a bill or note imports to be payable is limited by months, without stating whether they are to be calendar or lunar months, it is to be computed by (67) calendar, not lunar months.

Thus, on a bill or note payable one month after

(65) Vide Mar. 2d ed. p. 25. Beawes, § 251. 1st ed. p. 447.

(66) Mar. 2d ed. p. 22.

(67) Mar. 2d ed. p. 19.

date, and dated the 1st of January, the (68) month will not expire till the 1st of February, and the bill or note will not become due (allowing for the days of grace) until the 4th.

Where the time is computed by days, the day on which the event happens is to be (69) excluded.

Thus, on a bill or note payable ten days after date, dated the 1st of January, the time does not expire until the 11th.

Instead of an express limitation by years, months, or days, we continually find the time on bills drawn or payable at Amsterdam, Rotterdam, Hamburg, Altona, Paris or any place in France, Cadiz, Madrid, Bilboa, Leghorn, Genoa, or Venice, limited by *the usance*, that is, the usage between those places and this country; because, in the infancy of bills, all bills between this country and

(68) Vide Mar. 2d ed. p. 24. Beawes, § 253. 1st ed. p. 447.

(69) *Bellasis v. Hester*, Lord Raym. 280. Lutw. 1591. Upon a bill payable ten days after sight, Treby C. J. was of opinion, that the day on which the bill was seen by the drawee was not to be reckoned one of the ten, because then a bill payable one day after sight would be payable the day it was seen; but Powell and Neville Js. held the contrary, and judgment was given according to their opinion. However, in *May v. Cooper*, Fort. 376., the Court seemed to consider a note payable ten days after date, and dated the 21st July, as payable the 31st (not allowing, however, any days of grace); and in *Coleman v. Sayer*, 1 Barnard. B. R. 303., in an action upon a bill payable six days after sight, one question was, whether the day of sight was to be reckoned one of the six? Raymond C. J. said it was not; and the modern practice is conformable to his opinion.

any of those places respectively were usually made payable after the same interval.

An usance between this kingdom and Amsterdam, Rotterdam, Hamburg, Altona, or Paris or any place in France, is one calendar month from the date of the bill; an usance between us and Cadiz, Madrid, or Bilboa, two; an usance between us and Leghorn, Genoa, or Venice, three.

A double usance is double the accustomed time; an half usance, half.

Where it is necessary to divide a month upon a half usance, which is the case where the usance is either one month or three, the division (70), notwithstanding the difference in the length of months, contains fifteen days.

The bankruptcy or known insolvency of the drawee or maker is no (71) excuse for a neglect to make a presentment, or to give notice;

(70) Mar. 2d ed. p. 23.

(71) In *Russel v. Langstaffe*, Dougl. 497. 515., Lee said, *arguendo*, that it had frequently been ruled by Lord Mansfield at Guildhall, that it is not an excuse for not making a demand on a note or bill, or for not giving notice of non-payment, that the drawer or acceptor has become a bankrupt, as many means may remain of obtaining payment by the assistance of friends, or otherwise; and Lord Mansfield, who was in court, did not deny the assertion: this dictum was also referred to, *arguendo*, in *Bickerdike v. Bollman*, 1 Term Rep. 408.

Esdaile & al. v. Sowerby & al. 11 East. Rep. 114. In an action by the indorsees of a bill drawn by Cheetham on Hill in favour of the defendants, and by them indorsed to the plaintiffs, a verdict was found for the plaintiffs, and a case reserved. The

Nor is a general ceasing to pay. (72)

Sect. 2. — Notice (73) must be given of a failure in the attempt to procure an acceptance, though the application for such acceptance might have been unnecessary; otherwise the person guilty of the neglect may lose his remedy upon the bill.

But such neglect will be no bar to a subsequent indorsee, if he took the bill before it became due, and gave value for it, being ignorant that accept-

bill, which was payable in London, became due on Saturday the 20th of February, when it was presented for payment, and dishonoured. By mistake, notice of non-payment was not given to the defendants, who resided at Liverpool, until the 27th of February, whereas it ought to have been given on the 24th, and they refused payment on the ground of this omission. Before the bill became due, the drawer had stopped payment and become bankrupt, and the acceptor was insolvent. The drawer had himself apprised the defendants of his situation at the time of his stopping payment, and that this bill would not be paid: they knew that the acceptor had no funds but such as the drawer furnished him with: and on the 25th of February they admitted to the plaintiff's agent that they knew of the insolvency of the drawer and acceptor. It was contended that notice of the dishonour was unnecessary; but the Court was clear that the insolvency of the drawer and acceptor, and the knowledge of it, did not dispense with the necessity of giving notice of the dishonour of the bill to the defendants. *Postea* to the defendants. See also *Smith v. Beckett*, and *Brown v. Massey*, *post*.

(72) See *Howe v. Bowes*, *antè*, p. 221.

(73) Vide *Blesard v. Hirst*, and *Goodall v. Dolley*, *post*.

ance had been refused (74), and the bill do not import upon the face of it to have been noted or protested for non-acceptance.

So if the drawee offer a partial or conditional acceptance, or an acceptance at an extended period, or if any other person offer an absolute one, though the holder may be willing to acquiesce in such acceptance, he must (75) give notice.

(74) *O'Keefe v. Dunn*, 6 Taunt. 305. (1815. Trin.) 19th June, a bill at one month after date was drawn by defendants, payable to Sinclair, or order: Sinclair presented it for acceptance, and acceptance was refused, but no notice was given to defendants: Sinclair indorsed the bill to plaintiff for a valuable consideration, before the month from the date expired, but plaintiff had no notice of the prior refusal to accept: 13th July, plaintiff presented the bill for acceptance, which was refused. Action indè: defendants pleaded the presentment for acceptance by Sinclair, the refusal, and want of notice thereof; plaintiff traversed the presentment and refusal, and after verdict thereon for defendants, rule nisi to enter judgment for plaintiff non obstante veredicto: and after cause shown, and time to consider, Gibbs C. J., Heath and Dallas, against Chambre J., were of opinion that plaintiff was entitled to judgment; that the bill did not necessarily require presentment for acceptance; that defendants therefore had not, by the nature of the instrument, stipulated for such presentment; but that, on the contrary, they had, by its form, agreed that such presentment should not be necessary, and that the bill, if the holders so pleased, should be negotiable till the period for payment arrived; that an innocent indorsee therefore might be deluded, and the negotiation of such bills defeated, if his remedy were to be destroyed by a fact of which he had no notice, and as to which there was nothing to raise a suspicion. Rule absolute. And on error, the judgment was affirmed in the King's Bench. *Antè*, *Dunn v. O'Keefe*, p. 163.

(75) *Vide* Mar. 4th ed. p. 21. Beawes, § 221. 2d ed. p. 445.

In that case, however, if he wish to have the power of availing himself of it, he should mention in his notice the acceptance offered; for a notice generally of non-acceptance shows (76) he did not acquiesce in such offer.

A neglect to give notice, where there is a conditional acceptance, is done away by the completion of those conditions before the bill becomes payable; and a neglect, where there is an acceptance as to part and a refusal as to the residue only, discharges the persons entitled to notice as to the residue only.

The notice must come from the (77) holder, or from some party entitled to call for payment or reimbursement.

It has, indeed, been held, that notice from the acceptor to the drawer that he had not been able to pay it, and that it was then in plaintiff's hands, was sufficient; but that might, perhaps, have been

(76) Vide *Sproat v. Matthews*, *antè*, p. 196. note (50).

(77) *Ex parte Barclay*, 7 Ves. 597. Barclay was indorsee and holder of two bills, drawn by Kemp upon Dearlow, and indorsed by Clay to Barclay. These bills were dishonoured, of which Clay gave notice to Kemp; and on petition by Barclay to be allowed to prove these bills, under a commission of bankruptcy issued against Kemp, one question was, whether this notice from Clay, and not from Barclay the holder, was sufficient? And Lord Eldon C. J., after referring to *Tindal v. Brown*, held that the notice ought to have come from the holder, and dismissed the petition. See *Jameson v. Swinton*, *post*, p. 270.

on the ground that the acceptor wrote for the plaintiff, and as his agent. (78)

A notice from the holder or any other party will enure to the benefit of every other party who stands between the person giving the notice and the person to whom it is given. (79)

Therefore, a notice from the last indorsee to the drawer, will operate as a notice from each indorser.

It is, nevertheless, prudent in each party who receives a notice, to give immediate notice to those parties against whom he may have right to claim; for, the holder may have omitted notice to some of them, and that will be no protection (80); or there may be difficulties in proving such notice.

(78) *Rosher v. Kieran*, 4 Campb. 87. Indorsees of bill against drawer, and the question was, whether defendant had had due notice of the bill's dishonour? It was proved, that, on the day the bill became due, the acceptor wrote to defendant that he had not been able to pay the bill, and that it was in plaintiff's hands: Lord Ellenborough held this sufficient, and verdict for plaintiff. See *Stewart v. Kennet*, 2 Campb. 177.

(79) *Wilson v. Swabey*, 1 Stark. 34. In an action by indorsee of a bill against the drawer, it appeared that notice was communicated to Lewis, an indorser, the day after the bill became due, and that Lewis gave defendant notice the next day: it was objected, that plaintiff had not given defendant notice; but Lord Ellenborough said, notice from any person who was party to the bill was sufficient, and plaintiff had a verdict.

(80) *Edwards v. Dick*, 4 B. & A. 212. In an action by indorsee against drawer, it appeared that the acceptor made the bill payable at a particular place, and it did not appear that plaintiff had given the acceptor notice of its dishonour: but, on

Though a holder, or any other party, give no notice but to the person of whom he took the bill, yet if notice be communicated without laches to the prior parties, he may avail himself of such communication, and sue any of such prior parties; it is no objection in such case that there was no notice immediately from the plaintiff to the defendant. (81)

Though no prescribed form, be necessary for notice of the dishonour of a bill or note, it ought to import that the person to whom it is given is considered liable, and that payment from him is expected. (82)

motion for nonsuit on that ground, the Court held it sufficient, in order to warrant a suit against defendant, that notice was given to him; he could not object that a third person had not had notice: if he were entitled to a remedy over against the acceptor, he should have given him notice. Rule refused.

(81) See note (79).

(82) *Tindal v. Brown*, 1 Term Rep. 167. 186. A note which became due on the 5th of October, was presented at ten in the morning, and the maker not being at home, word was left for him where it lay; the holder sent again on the 6th, when the maker promised to take it up within the banking hours, which were from nine to four; on the 7th, the holder sent again to the maker, and the note not being paid, gave notice to the defendant, who was an indorser, but the defendant said he had made it his own; the maker had told defendant on the 6th, that he could not pay it, and desired the defendant would: all the parties lived at Bristol. The jury found for the plaintiff; but upon a rule to show cause why there should not be a new trial, and cause shown, the Court granted a new trial. Lord Mansfield said, "What is reasonable notice is a question partly of fact, and partly of law: it may depend in some measure on facts; such as the distance at which the parties live, the

And the notice ought to import that the bill or note has been dishonoured : a mere demand of payment and threat of law proceedings in case of non-payment is not sufficient. (83)

" course of the post, &c. : but wherever a rule can be laid down with respect to this reasonableness, *that* should be decided by the Court, and adhered to for the sake of certainty." Per Willes J. " New credit was given to the maker, and I cannot consider notice from the maker equal to notice from the holder." Ashhurst J. " The reasonableness ought to be settled as a question of law ; the next day, at the most, is as long as is necessary in a case like this ; if the parties live at a small distance, this is a sufficient time ; if at a greater, they should write by the next post. Notice means something more than knowledge, because it is competent to the holder to give credit to the maker : it is not enough to say that the maker does not intend to pay, but that the holder does not intend to give credit ; the party ought to know whether the holder intends to give credit to the maker, or to resort to him." Per Buller J. " *When* the post goes out, is a matter of fact ; when that is established, it is a matter of law, what notice is reasonable ; as to giving time, the holder does it at his peril, and that is enough to decide the case ; the purpose of giving notice is to let the party know that he is looked to for payment, that he may have his remedy over by an early application ; if it shows that the holder has given time, it discharges the party : it ought to purport that the holder looks to him for payment, and a notice from another person cannot be sufficient ; it must come from the holder." Upon the second trial there was contradictory evidence whether the notice from the maker was on the sixth or the seventh, and the jury found again for the plaintiff ; but the Court said, it was a verdict against law, and granted another new trial.

(83) *Hartley v. Case*, 4 Barn. & Cr. 339. In an action by indorsee against the drawer of a bill drawn on Case the elder, the only notice to defendant was a letter from plaintiff to

Especially if such demand be made on the day the bill or note becomes due. (83)

In the case of a foreign bill, to give effect to the notice it is (84) necessary that a minute of the non-acceptance or non-payment, and a solemn declaration on the part of the holder against any loss to be sustained thereby (which minute and

defendant the day the bill became due. Its import was, "I am desired to apply to you for payment of 150*l.* due to myself on a draft drawn by Mr. Case on Mr. Case, which I hope you will on receipt discharge, to prevent the necessity of law proceedings, which otherwise will immediately take place:" Abbott C. J. thought this no notice of the dishonour, and nonsuited plaintiff, and on rule nisi to set aside the nonsuit the Court agreed with him. Rule discharged.

(84) *Rogers v. Stephens*, 2 Term Rep. 713. In an action against the drawer of a foreign bill, it appeared that the bill had been noted for non-acceptance, but there was no protest, and this was pressed as a ground for a nonsuit. Lord Kenyon admitted the objection, but upon the other circumstances thought this a case in which a protest was not necessary. See post, p. 291. note (137).

Gale v. Walsh, 5 Term Rep. 239. In an action against the drawer of a foreign bill, it was reserved as a point whether it was necessary to prove a protest; and the Court thought it so clear upon the motion to enter a nonsuit, that they suggested to the plaintiff's counsel the expediency of making the rule absolute in the first instance; and upon their acquiescence it was accordingly done; they afterwards, however, wished to have it opened, upon an idea that the drawer had no effects in the hands of the drawee, but it appearing upon the report that that idea was not founded, the rule stood. And in *Brough v. Parkins*, Lord Raym. 993. 6 Mod. 80. Salk. 131. Holt C. J. says, "A protest on a foreign bill is part of the custom." See also *Orr v. Maginnis*, post.

declaration is called a protest), should be made out by a notary public, or (if there be no such notary in or near the place where the bill is payable) by an inhabitant in the presence of two witnesses; and in some cases a copy, or some other memorial of it, should accompany the notice.

But (85) if a man being abroad draw or indorse a bill on this country, and afterwards come here, a notice to him here need not be accompanied by the protest, or by any memorial of it.

(85) *Cromwell v. Hynson*, 2 Esp. N. P. C. 511. Indorsee against the indorser of a foreign bill. When the indorsement was made, Hynson (a master of a ship) was in Jamaica where the bill was drawn, but his residence was at Stepney. The bill was presented for acceptance, dishonoured and protested; and then sent to Hynson's house for payment, with notice of non-acceptance. Hynson was not then in England, but the bill was shown to his wife, and the circumstances stated to her. It was urged, 1st, that notice should have been sent to Jamaica; 2dly, that the demand on the wife was not sufficient; and, 3dly, that a copy of the protest should have been sent with the notice; but Lord Kenyon over-ruled all the objections, and the plaintiff had a verdict.

Robins v. Gibson, 3 Campb. 334. 1 M. & S. 288. Indorsee of bill drawn at Buenos Ayres against drawer; before the bill became due, defendant returned to this country: the bill was dishonoured, and notice thereof left at his house, but no notice given of its being protested: Lord Ellenborough held the notice sufficient; and on motion for new trial, the Court agreed with him: Lord Ellenborough said, it did not appear that defendant requested to have the protest; he had notice of the bill's dishonour, and as circumstances alter, the rule respecting notice changes; if the party is abroad he cannot know of the protest but by having it: being here, he might have enquired to ascertain that fact. Rule refused.

At least he cannot object to such notice, unless he applied for the protest on receiving the notice.

A similar protest may also be made on the (86) non-acceptance of an inland bill, if such bill be for the payment of 5*l.* or upwards within a limited time after date, and the value be expressed therein to

(86) By 3 & 4 Anne, c. 9. s. 4. "Whereas by an act of parliament in the 9th year of the reign of his late majesty King William the Third, intituled, "An act for the better payment of "inland bills of exchange," it is, among other things, enacted, "that from and after presentation and acceptance of the said "bill or bills of exchange (which acceptance shall be by the "underwriting the same under the party's hand so accepting), "and after the expiration of three days after the said bill or "bills shall become due, the party to whom the said bill or "bills are made payable, his servant, agent or assigns, may, "and shall cause the same bill or bills to be protested in "manner as in the said act is enacted;" and whereas by there being no provision made therein for protesting such bill or bills, in case the party on whom the same are or shall be drawn refuse to accept the same, by underwriting the same under his hand, all merchants and others, do refuse to underwrite such bill or bills, or make any other than a promissory acceptance, by which means the effect and good intent of the said act in that behalf is wholly evaded, and no bill or bills can be protested before or for want of such acceptance by underwriting the same as aforesaid; it is enacted, that from and after the first day of May, 1705, in case, upon presenting of any such bill or bills of exchange, the party or parties, on whom the same shall be drawn, shall refuse to accept the same, by underwriting the same as aforesaid, the party to whom the said bill or bills are made payable, his servant, agent or assigns, may and shall cause the said bill or bills to be protested for non-acceptance, as in case of foreign bills of exchange; for which protest there shall be paid two shillings, and no more.

have been received; or (87), after an acceptance written on such a bill, for its non-payment.

But not upon any other inland bills. (88)

(87) By 9 & 10 W. 3. c. 17. s. 1. "Whereas great damages and other inconveniences do frequently happen in the course of trade and commerce, by reason of delays of payment, and other neglects on inland bills of exchange in this kingdom;" it is enacted, that from and after the 24th day of June, 1698, all and every bill or bills of exchange drawn in, or dated at and from any trading city or town, or any other place in the kingdom of England, dominion of Wales, or town of Berwick upon Tweed, of the sum of 5*l.* sterling or upwards, upon any person or persons of or in London, or any other trading city, town, or any other place (in which said bill or bills of exchange shall be acknowledged and expressed the said value to be received), and which is and shall be drawn payable at a certain number of days, weeks or months after date thereof, that from and after presentation and acceptance of the said bill or bills of exchange (which acceptance shall be by the underwriting the same under the party's hand so accepting), and after the expiration of three days after the said bill or bills shall become due, the party to whom the said bill or bills are made payable, his servant, agent or assigns, may and shall cause the said bill or bills to be protested by a notary public, and in default of such notary public, by any other substantial person of the city, town or place, in the presence of two or more credible witnesses, refusal or neglect being first made of due payment of the same; which protest shall be made and written under a fair written copy of the said bill of exchange, in the words or form following:—

Know all men, that I, A. B., on the day of
at the usual place of abode of the said have demanded
payment of the bill, of the which the above is the copy, which
the said did not pay, wherefore I the said
do hereby protest the said bill. Dated this day of

(88) *Leftley v. Mills*, 4 Term Rep. 170. An inland bill for 20*l.* 7*s.* payable fourteen days after sight, became due 24th April,

A protest upon an inland bill is never necessary where (89) the bill is for the payment of less than 20*l.*; and on such as are for the payment of more,

1790. A banker's clerk called with it for payment in the morning, and the acceptor not being at home, left word where it lay; after six, another of the clerks, who was a notary, noted it, and between seven and eight the first clerk went with it again. The acceptor tendered him the amount of the bill, and sixpence over; but he insisted on 2*s.* 6*d.* for the noting, and *that* sum not being paid, an action was brought against the acceptor, who pleaded the tender. Lord Kenyon thought a tender of the amount of the bill at any time of the day it was payable, was sufficient; upon which the jury found a verdict for the defendant. A rule to show cause why there should not be a new trial, was afterwards granted; and upon cause shown Lord Kenyon thought the acceptor had till the last minute of the day of grace to pay the bill, and that it could not be noted or protested till the following day. Buller J. thought they were payable any time of the last day of grace upon demand, so as such demand was made within reasonable hours; and that they might be protested on that day. Grose J. declined giving any opinion on these points; but the whole Court concurred, that the bill in question could not be noted, because it was payable within a limited time after sight, and the statute authorises the noting of such inland bills only as are payable after date. Lord Kenyon also thought that the sixpence tendered was sufficient for the noting, and the rule was discharged.

(89) By 3 & 4 Anne, c. 9. s. 6. it is provided, that no such protest shall be necessary, either for non-acceptance or non-payment of any inland bill of exchange, unless the value be acknowledged and expressed in such bill to be received, and unless such bill be drawn for the payment of 20*l.* sterling or upwards; and that the protest hereby required for non-acceptance shall be made by such persons as are appointed by the act of 9 & 10 W. 3. c. 17. to protest inland bills of exchange for non-payment thereof.

though the 3d & 4th Ann. c. 9. s. 5. contain words which *primâ facie* import that a neglect to (90)

(90) *Brough v. Parkins*, Tr. 2 Anne, Lord Raym. 992. 6 Mod. 80. Salk. 131. In an action against the drawer of an inland bill, it was insisted upon for error, that it did not appear by the declaration, that the bill had been protested; sed per Holt C.J. "on an inland bill no protest was necessary by the common law, and the statute does not destroy or take away the party's action where there is no protest; nor is the want of a protest any bar of the action; but the act seems only to take away from the plaintiff his interest and damages where he has not made a protest, or to give the drawers a remedy against him by way of action for their costs and damages" — and the judgment was affirmed.

Harris v. Benson, Tr. 5 G. 2. Str. 910. In an action against the drawer of an inland bill after an acceptance, Raymond, C. J. ruled, that for want of a protest according to 9 & 10 W. 3. c. 17. the drawer could not be charged with interest. In *Lumley v. Palmer*, Ann. 77. Lord Hardwicke says, "At common law there was no way to charge the drawer of an inland bill with interest and costs after a protest; and therefore the first act was made, that after acceptance by underwriting, these bills might be protested for non-payment, and that thereon interest and charges should be paid by the drawer from the time of the protest; the statute does not say the original sum, for that is recoverable without protest, but interest and charges."

Windle v. Andrews, B. R. Trin. 59 G. 3. 2 Barn. & A. 696. In an action against the drawer of an inland bill, in which the requisites specified in 3 & 4 Anne, c. 9. s. 6. occurred, rule nisi to strike out the interest from the verdict, on the ground that there had been no protest; but on cause shown, the Court held the want of a protest no ground for disallowing interest where notice of the dishonour of the bill had been duly given; that the object of 9 & 10 W. 3., and 3 & 4 Anne, c. 9. s. 4. was to give interest, damages and costs in cases in which it was supposed they were not recoverable at common law, not to deprive a

procure it would preclude the holder from recovering, against the persons entitled to notice, any special damages or costs occasioned by the non-acceptance or non-payment and interest, yet it hath not generally that effect. (91)

plaintiff of them in any case in which the common law would give them; that the 5th section, which contained the words of deprivation, was by way of proviso only, to qualify the additional benefit that statute and the statute of William were supposed for the first time to give; that the proviso in the 8th section contained words to secure to a plaintiff all his common-law rights, and that the right to damages was a common-law right; that it was upon this principle only that the constant allowance of interest where there was no protest could be explained; that the 5th section contained words to annul parol acceptances; and in *Rex v. Meggott*, Hil. 7 G. 2. antè, p. 174. n.(7), Eyre C.J. of K. B. held that they had that effect; that this notion was corrected in *Lumley v. Palmer*, antè, p. 174. n.(7), in Mich. Term 8 G. 2. upon the principle now adopted by the Court, that the 5th section of 3 & 4 Anne, c. 9. deprived a party of no remedy he had at common law; that that case must be considered as having virtually over-ruled *Harris v. Benson*, which was in Tr. 5 G. 2., and that from that time, for any thing which appeared to the contrary, parol acceptances had been held binding, and interest had been allowed against the drawers and indorsers of all inland bills though no instance could be shown in which any such bill had been protested.

(91) By 3 & 4 Anne, c. 9. s. 5. it is provided, that if such (see s. 4. antè, p. 260.) bill be not accepted by such under-writing, or indorsement in writing, no drawer of any such inland bill shall be liable to pay any costs, damages, or interest thereupon, unless such protest be made for the non-acceptance thereof, and within fourteen days after such protest the same be sent, or otherwise notice thereof be given, to the party from whom such bill was received, or left in writing at the place of his or her

A protest may (92) also be made on the non-payment of coal notes, given pursuant to 3 G. 2. c. 26. s. 7.

usual abode ; and if such bill be accepted, and not paid before the expiration of three days after the said bill shall become due and payable, then no drawer of such bill shall be compellible to pay any costs, damages, or interest thereupon, unless a protest be made and sent, or notice thereof be given, in manner and form above mentioned. Nevertheless every drawer of such bill shall be liable to make payment of costs, damages, and interest upon such inland bill, if any one protest be made of non-acceptance or non-payment thereof, and notice thereof be sent, given, or left as aforesaid.

(92) By 3 G. 2. c. 26. s. 7. it is enacted, That from and after the 24th day of June, 1730, all lightermen and other buyers of, or contractors for, coals on board of any ship or vessel in the port of London, shall, at the time of the delivery of such coals, either pay for the same in ready money, or for such part thereof as shall not be so paid shall give their respective promissory note or notes of their hands for payment thereof, expressing therein the words *value received in coals*, payable at such day or days, time or times, as shall for that purpose be agreed upon between such lightermen or other buyer of or contractor for coals, and the master or owner of such ship or vessel, or his agent or factor on his behalf ; and that all such notes, in case of non-payment at the respective days and times therein mentioned, shall and may be protested or noted in such manner as inland bills of exchange may now be ; and in default of such protesting or noting by any indorsee, and notice thereof given by such indorsee to the respective indorser or indorsers, within twenty days after such failure of payment, such respective indorser or indorsers, to whom such notice shall not be given, shall not be chargeable with or liable to answer or pay such sum of money, as shall be mentioned to be payable in or by such note or notes, nor any part thereof ; any law, usage, or custom to the contrary thereof notwithstanding.

A foreign bill should be noted for non-acceptance or non-payment on the (93) day on which acceptance or payment is refused; but it would seem that the protest (94) may be formally drawn

(93) In Buller's *Nisi Prius*, 272. it is said, "The use of noting is, that it should be done the very day of refusal, and the protest may be drawn any day after by the notary, and be dated of the day the noting was made."

In *Lestley v. Mills*, 4 Term Rep. 174., Buller J. says, "With regard to foreign bills of exchange, all the books agree that the protest must be made on the last day of grace." This however is not said with reference to any distinction between the time of noting the bill, and that of formally drawing up the protest, but merely as furnishing an argument to show within what time payment must be made; and the argument is equally conclusive, whether the party have the power of noting or of protesting the bill on the last day of grace. Indeed the noting is, in effect, an incipient protest.

(94) *Chaters v. Bell*, 4 Esp. N. P. C. 48. In an action by an indorsee against an indorser of a foreign bill, it appeared that the bill became due on the 24th of April, when payment was demanded and refused, and the bill noted for non-payment. Regular notice of the dishonour was given to the defendant, but he refused payment because there was no protest. On 14th of May, the protest was formally drawn up, and this action was afterwards brought. Lord Kenyon said, "He was of opinion, that if the bill was regularly presented and noted at the time, the protest might be made at any future period." A verdict was found for the plaintiff, but the point was reserved; and on the case coming on to be tried again on a *venire facias de novo* before Lord Ellenborough, his lordship expressed his concurrence with the opinion of Lord Kenyon. See the preceding note.

Mr. Selwyn, in his abridgment of the Law of *Nisi Prius*, 379. says, That a case was reserved in *Chaters v. Bell*, for the opinion of the Court, and that the Court, after argument, con-

up at any future period, provided that, in the event of a suit, it be drawn up before the commencement of such suit.

A protest for (95) non-acceptance of an inland bill may be made in like manner as for non-acceptance of a foreign bill; but a protest for (96) non-payment of an inland bill cannot be made until the day after such bill has become due.

A notice the day the bill or note becomes due, is not too soon; for though payment may still be made within the day, non-payment on presentment is a dishonour. (97)

Especially if the acceptor says when the bill is presented, that it never will be paid. (98)

ceiving the question to be of great importance, directed it to be turned into a special verdict; but that the sum in dispute being small, and the parties unwilling to incur the expense of a special verdict, the recommendation of the Court was not attended to, and the case was not mentioned again.

(95) See 3 & 4 Anne, c. 9. s. 4. antè, p. 260. n. (86).

(96) See 9 & 10 W. 3. c. 17. s. 1. antè, p. 261. n. (87), which enables persons to make such protests "after the *expiration* of "three days" after the bill has become due.

(97) *Burridge v. Manners*, 3 Campb. 193. Indorsee of note against payee; the note was presented the forenoon of the day it became due, when payment was refused, and in the afternoon of that day plaintiff sent notice of its dishonour to defendant; it was urged that this notice was too soon, because the maker had the whole day to pay the note; but Lord Ellenborough thought it a sufficient notice, for as soon as the maker refused payment the note was dishonoured. The plaintiff had a verdict.

(98) *Ex parte Moline*, 19 Ves. 216. Petition to expunge a debt by indorsee of bill against drawer, because he had not given proper notice of the bill's dishonour. The bill was pre-

To such of the parties as reside in the place where the presentment was made, the notice must be given at the farthest, by the expiration of the (99) day following the refusal; to those who reside elsewhere, by (100) the post of that or the next post day.

Each party has a day for giving notice. (101)

sented, at 11 o'clock on the day it became due, to the acceptor, who said it never would be paid. The notice was given immediately. It was urged, that a refusal so early in the day, without proper application, was no ground for treating the bill as dishonoured, and that the notice was premature. Eldon C. thought otherwise, and dismissed the petition.

(99) *Tindal v. Brown*, ante, p. 256. note (82). *Muilman v. D'Eguino*, ante, p. 229. note (33).

Smith v. Mullet, 2 Campb. N. P. C. 208. In an action against an indorser of a bill, the only question was, whether the plaintiff had given due notice of its dishonour to one Aylett, his immediate indorser. All the parties resided in London; the bill became due and was dishonoured on the 19th of May, a Saturday. The holder (who had received it from the plaintiff) gave notice to the plaintiff on the Monday; and plaintiff sent notice to Aylett on Tuesday, by the twopenny post, but so late that it did not reach Aylett till Wednesday. Lord Ellenborough said, he thought there could be no rule more convenient than that where all the parties resided in London each should have a day to give notice; here a day had been lost. He therefore nonsuited the plaintiff.

(100) *Malyncs*, B. 3. c. 6. s. 1. 1st ed. p. 265. Mar. 2d ed. p. 24.

(101) *Bray v. Hadwen*, 5 M. & S. 68. Plaintiffs paid into their bankers at Launceston a bill on London. On Sunday morning, 17th July, about half after eight, the Launceston bankers received a letter from London announcing its dishonour; Monday evening they put into the post a letter to plaintiffs at Tavistock to give them notice; that post did not leave

Launceston till twelve on Tuesday; a post left Launceston for Tavistock at twelve on Monday. Plaintiffs forwarded notice without delay to the person who indorsed the bill to them, and that person immediately forwarded notice to defendant, who was an earlier indorser. Two queries were made: one, whether the Launceston bankers were not bound to have sent notice to plaintiff by Monday's post; and, secondly, whether plaintiff should not have given notice immediately to defendant, and not have left it to the later indorser to give that notice: Graham B. over-ruled both objections, and verdict for plaintiff: and on motion for new trial, the Court held it was now the settled rule that each party was entitled to an entire day for the purpose of giving notice, and that the Launceston bankers therefore were not bound to send their notice by the Monday's post, but had the whole of Monday to put in their letter; and that, as there was no delay in transmitting notice to defendant, he could not protect himself on the ground of want of notice, and rule refused.

Wright v. Shawcross, 2 Barn. & A. 501. Plaintiff received notice by a letter on a Sunday of the dishonour of a bill: he did not send notice to defendant till Tuesday's post, which set out in the evening; he might have sent it in the evening of Monday by the Monday's post. But on motion for new trial, after verdict for plaintiff, the Court held plaintiff was not bound to open the letter till Monday, nor bound to send notice till the Tuesday, and therefore rule refused.

Hawkes v. Salter, 4 Bingh. 715. A bill was dishonoured at Norwich on Saturday. The post to the place where notice was to be sent left Norwich at half after nine on Monday. In the course of Monday plaintiff wrote a letter to be sent by Tuesday's post giving notice. A clerk copied it, and said it was put into the post; but stated, that he had no recollection whether it was put into the post by himself or by another clerk. On points saved whether notice by the Tuesday's post would have been sufficient, and whether there was sufficient evidence of such notice, Best C. J. expressed himself clearly that notice by Tuesday's post would have been in time; but he thought there was no sufficient evidence that the notice had been sent. And on payment of costs (qu. by plaintiff?), rule affirmed for new trial.

And he is entitled to the whole day: at least, eight or nine o'clock at night is not too late. (102)

He will be entitled to the whole day, though the post by which he is to send it, goes out within the day. (101)

And though there be no post the succeeding day for the place to which he is to send. (103)

Therefore, where the notice is to be sent by the post, it will be sufficient if it be sent by the post of the following day. (101)

Or, if there be no post the following day, the day after. (103)

(102) *Jameson v. Swinton*, 2 Taunt. 224. In an action on a bill, by the plaintiff, who was the indorsee of Elsham, against an indorser, the defence was, that due notice of the dishonour, which took place on the 10th of July, had not been given. Elsham (the last indorser) who lived at Back-hill, Holborn, received notice on the 10th at four o'clock in the afternoon, and he gave notice on the 11th, between eight and nine o'clock at night, to the defendant, who lived at Islington. Lawrence J. held, that this was sufficient to entitle Elsham to recover from the defendant, and therefore sufficient to enable the plaintiff, who received the bill from Elsham, to recover. Verdict for the plaintiff; and on motion to set it aside, it was urged, that the notice should have been given within the hours of business, but the Court held the notice sufficient. Rule refused.

(103) *Geill v. Jeremy*, 1. Mood. & Malk. 61. Plaintiff received by the post at 9 A.M. Thursday, August 31., notice of the dishonour of a bill: he had to send notice to defendant in London. The post left his village at six in the evening, and it left the post town, which was only two miles off, at nine. A letter by that post would have reached London on Saturday. There was no post for London on Friday, and plaintiff did not write till Saturday: that letter did not reach London till Monday. It

Where a party receives notice on a Sunday, he is in the same situation as if it did not reach him till the Monday; he is not bound to pay it any attention till the Monday (101);

And has the whole of Monday for the purpose.
(101)

So, if the day on which notice ought thus to be given be a (104) day of public rest, as Christmas-day or Good Friday, or any day appointed by proclamation for a solemn fast or thanksgiving, the notice need not be given until the following day.

And it has been held that where a man is of a religion which gives to any other day of the week the sanctity of Sunday, as in the case of Jews (105),

was insisted this was too late. *Sed per Lord Tenterden*, "It is of importance to have a fixed rule, and not to resort to nice questions, in each case, of a sufficiency of hours or minutes: the general rule is, the party need not write on the very day he receives the notice; if there be no post the next day, it makes no difference. The next post after the day on which he receives the notice is sufficient." Verdict for plaintiff.

(104) See *Smith v. Mullet*, *antè*, p. 268., and *Haynes v. Birks*, and *Scott v. Lifford*, *post*, p. 272, 273. n. (109). See also *Tassell v. Lewis*, *antè*, p. 245. n. (56). 39 & 40 G. 3. c. 42., and 7 & 8 G. 4. c. 15.

(105) *Lindo v. Unsworth*, 2 Campb. N. P. C. 602. Notice of the dishonour of a bill was sent to the plaintiff in London, on the 8th of October; but he being a Jew, and the 8th of October being the day of the greatest Jewish festival throughout the year, on which all Jews are prohibited from attending to secular affairs, gave no notice by the post of that day to the defendant, who lived at Lancaster, but sent it to him by the post of the 9th. Lord Ellenborough held, that the plaintiff was excused by his religion from giving notice on the 8th; and that

he is entitled to the same indulgence as to that day.

Where Christmas day, or such day of fast or thanksgiving shall be on a Monday, notice of the dishonour of bills or notes due or payable the Saturday preceding need not be given until the Tuesday. (106)

And Good Friday, Christmas day, and any day of fast or thanksgiving shall from 10th April 1827, as far as regards bills and notes, be treated and considered as Sunday. (107)

But these provisions do not apply to Scotland. (108)

If the holder of a bill or note place it in the hands of his banker, the banker is only bound to give notice of its dishonour to his customer, in like manner as if the banker were himself the holder, and his customer were the party next entitled to notice. (109)

the notice sent by the post on the 9th was sufficient. The plaintiff had a verdict.

(106) 7 & 8 G. 4. c. 15. s. 1, 2.

(107) 7 & 8 G. 4. c. 15. s. 3.

(108) 7 & 8 G. 4. c. 15. s. 4.

(109) *Haynes v. Birks*, 3 Bos. and Pull. 599. In an action against the indorser of a bill, it appeared that the bill, which had been indorsed in blank, and deposited by the plaintiff in the hands of his bankers, became due on Saturday, October 1st. On that day, at two o'clock, it was presented for payment by the bankers, and payment being refused, it was again presented between nine and ten at night by a notary, and again dishonoured; the bankers sent the bill, and notice of its dishonour,

And the customer has the like time to communicate such notice, as if he had received it from a holder. (109)

And therefore, by thus placing a bill or note in a banker's hands, the number of persons from whom notice must pass is increased by one. (109)

Thus, notice sent by a London banker to a London customer, the day after the dishonour (109), is in time; and if the customer communicate that notice the day following, that (106) will be in time also.

to the plaintiff on the Monday, and the plaintiff gave notice to the defendant on Tuesday, about noon; the plaintiff lived at Knightsbridge, and the defendant in Tottenham-court-road. The only question was, whether this notice was sufficient. A verdict was found for the plaintiff, with liberty to defendant to move to enter a nonsuit. On motion accordingly, it was urged that the bankers were to be considered as the agents of the plaintiff, and that the defendant was entitled to the same notice as if the bill had remained in the plaintiff's hands; but the Court thought that reasonable diligence had been used, and therefore refused a rule. Lord Alvanley, however, said, that if a bill be returned to a banker, he is bound to give notice to his principal that very day, if he can do so by using ordinary diligence. (But query whether this be so?)

Scott v. Lifford, 9 East's Rep. 347. A bill due on the 4th of June, was presented on that day, by Down and Co. the plaintiff's bankers, who lived in London; the plaintiff lived in London also, and they gave him notice on the 5th. The defendant (the drawer) lived at Shadwell; and on the 6th the plaintiff sent notice to him by the twopenny post. Lord Ellenborough left it to the jury, whether the plaintiff had communicated the notice in reasonable time; and they thought he had. And on a motion for a new trial, Lord Ellenborough said, he could not say that the plaintiff, *omissis omnibus aliis negotiis*, was bound

If a trader, who receives a bill from his traveller, do not know where the person, whose name stood last upon the bill when he received it, lives, he may give notice to his traveller, and a notice from the traveller to that person will be in time. (110)

Though the sending to the traveller create a delay of several days. (110)

to post off immediately with notice; it was sufficient if reasonable diligence had been used. The Court thought the verdict right, and refused a rule.

Langdale v. Trimmer, 15 East, 291. Plaintiff paid a note into Drummonds, his bankers; it became due 25th February, was presented and dishonoured; they presented it again the 26th a little before five, and payment being again refused, they gave notice directly to plaintiff, who lived in Holborn; by the next day's post, plaintiff gave notice to defendant, who lived at Farnham. Lord Ellenborough thought both notices in time, and after verdict for plaintiff, and motion for a new trial, the Court agreed with him; they thought the banker was to be considered as a distinct holder, not as identified with his customer, and that the banker had till the next day to give notice to his customer, and the customer till the day following; and the rule was refused.

(110) *Baldwin v. Richardson*, 1 Barn. & Cr. 245. In an action by indorsee of a note against indorser, the defence was, that plaintiff had been discharged by the laches of Waller, a subsequent indorsee, who lived at Luton in Bedfordshire, and that the notice therefore from plaintiff to defendant was too late. Waller received the note by remittance from his traveller, who gave provincial notes for it to one Wilson, and plaintiff's was then the last indorsement upon it. The traveller did not apprise Waller where plaintiff lived, nor did Waller know: he therefore wrote to his traveller, who was at Edinburgh, and the traveller immediately gave plaintiff notice, but plaintiff did not receive the notice so soon by several days as he would, had it been sent to

And if the holder employ an attorney to find out where a party entitled to notice lives, the attorney has a day after he receives the information to apprise his client of it, and to receive his directions. (111)

It is no excuse, for not giving notice the next day after a party receives one, that he received his notice earlier than the preceding parties were bound to give it; and that he gave notice within what would have been proper time if each preceding party had taken all the time the law allowed him. The time is to be calculated according to the period when the party in fact received his notice. (112)

Nor is it any excuse that there are several intervening parties between him who gives the notice and defendant to whom it is given; and that if the notice had been communicated through those intervening parties, and each had taken the time the law allows, the defendant would not have had the notice sooner. (112)

him direct from Luton. Abbott C. J. thought this no defence. On motion for new trial, it was urged, that Waller's traveller should, when he remitted the note, have stated where plaintiff lived; but the Court thought otherwise, and that the notice to plaintiff was in time. Rule refused.

(111) See *Firth v. Thrush*, post, p. 283.

(112) *Turner v. Leech*, 4 B. & A. 451. Plaintiff was the eleventh indorser to a bill, defendant the 8th; plaintiff indorsed it to Bennett, Bennett to Fletcher, Fletcher to Hordem, and Hordem to Sansom; it was dishonoured Saturday, 30th August,

Sending a verbal notice to a merchant's counting-house (113) in the ordinary hours of business, at a time when he or some of his people might reasonably be expected to be there, is sufficient ; it is not necessary to leave or send a written notice, or to send to the house where he lives. (114)

and on Monday, 1st September, Sansom gave notice to Hordem ; this reached Hordem the 2d, and the same day he gave notice to Fletcher ; Fletcher sent notice to Bennett on the 3d, and this notice reached Bennett on the 4th ; he did nothing till the 8th, and then he gave notice to plaintiff, who paid the bill. Plaintiff sued defendant, and on case plaintiff urged that Bennett's laches had not discharged defendant, because defendant had notice as soon as if each party between him and Sansom had taken the time the law allowed them ; but the Court was clear that defendant was discharged, and judgment for defendant.

(113) *Goldsmith v. Bland*, at Guildhall, cor. Lord Eldon, 1 March, 1800. The plaintiffs sued the defendants as indorsers of two foreign bills, and to prove notice the plaintiffs showed that they sent a clerk to the defendant's counting-house, near the exchange, between four and five o'clock in the afternoon ; nobody was in the counting-house ; the clerk saw a servant girl at the house, who said that nobody was in the way, and he returned, having left no message with her. Lord Eldon told the jury, that if they thought the defendants ought to have had somebody in the counting-house at the time, he was of opinion, that the plaintiffs had done all that was necessary by sending their clerk ; that the notice was in law sufficient, if the time was regular, whether the defendants were solvent at the time or not. The jury thought that the defendants ought to have had somebody in the counting-house at the time, and that the plaintiffs had done all that was necessary. Verdict for the plaintiffs for 1633*l*.

(114) *Cross v. Smith*, 1 M. & S. 545. Smith and Co. of Hull had a bill for 3176*l*. drawn by Fea and Co., accepted by Tuke,

But telling a man's attorney that a bill is dis-

payable at Smith, Payne, and Smith's, due 12th of April, 1810; this bill they remitted to Smith, Payne, and Smith, their correspondents. Tuke banked with Smith and Co.; 6th of April Tuke directed Smith and Co. to write to Smith, Payne, and Smith not to pay this bill; they did so, and when the bill was due, it was protested and sent to Smith and Co. Fea and Co. had a counting-house at Hull, where they were merchants, and one lived within one mile, and the other within ten, of Hull. The morning after Smith and Co. received the bill, their clerk went to give notice, and called at the counting-house of Fea and Co. about half after ten; he found the outward door open, the inner one locked; he knocked so that he must have been heard had any one been there; waited two or three minutes and went away; on his return he saw Fea and Co.'s attorney, and told him. The next morning he went again at the same hour, but with no better success. No written notice was left, nor was any notice sent to the residence of either of the partners. Fea and Co. became bankrupts, and their assignees insisted that Smith and Co. had made this bill their own, and were not entitled to carry it to the debit of Fea and Co.; first, because they ought to have given notice of the directions they received from Tuke, to prevent payment by Smith, Payne, and Smith; and secondly, because calling at the counting-house without leaving a written notice, and without sending one to the residence of one of the partners, was not sufficient notice of the bill's dishonour. On case, and time to consider, the Court thought the notice to the attorney nothing, because he was not the proper person to receive such a notice; but they held, that Smith and Co. were not bound to give notice of the directions they had received, and that it would have been a breach of confidence in them to have done so; and they held, that going to the counting-house at a time it should have been open, was sufficient; and that it was not necessary to leave a written notice, or to send to the residence of any of the parties: *postea* to defendants.

Bancroft v. Hall, Holt, 476. Indorsee of bill against drawer. Plaintiff received notice of the bill's dishonour at Manchester,

honoured, is no notice, unless the attorney has more than the usual powers. (115)

Though the indorser of a bill receive directions from the acceptor, to send word to the house at which it is payable to forbid its payment, and he do so, he is not bound to give any notice of those directions to any of the parties to the bill. (115)

And he is entitled to act as though he had received no such directions. (115)

And it is the same, if the holder of the bill receive those directions.

Sending (116) notice by the post is sufficient

24th of May; the same day he sent a letter by a private hand to his agent at Liverpool, to give defendant notice; the agent called at defendant's counting-house about six or seven, p. m., but the counting-house was shut up, and defendant did not receive notice till the morning of the 27th, Monday. Two points were ruled, — 1st, that sending by a private hand to an agent to give notice was sufficient; secondly, that it was sufficient for the agent to take the ordinary mode to give notice; the ordinary time of shutting was eight or nine.

(115) *Cross v. Smith*, antè, p. 276.

(116) *Saunderson v. Judge*, antè, p. 219. note (13). The holder of a note wrote to the defendant, who was one of the indorsers, to say it was dishonoured, and put the letter in the post, but there was no evidence that it ever reached the defendant; and the Court held, that sending the letter by the post was quite sufficient. *S. P. Kuth v. Weston*, 3 Esp. N.P.C. 54. In *Scott v. Lifford*, 9 East's Rep. 347. and 1 Camp. N. P.C. 246., the parties lived in London and its vicinity, within reach of the twopenny post; notice of the dishonour of the bill was sent by that conveyance, and the Court of King's Bench held that it was sufficient. The notice, however, must appear

though it be not received; and where there is no post, it is sufficient to send by the ordinary mode of conveyance.

Therefore, in the case of a foreign bill, it (117) is sufficient to send it by the first regular ship bound for the place to which it is to be sent; and (117) it is no objection, that if sent by a ship bound elsewhere, it would by accident have arrived sooner, though the holder wrote other letters by that ship to the place to which the notice was to be sent.

And it is not essential the notice should be sent by the post where there is one; sending to an agent by a private conveyance, that he may give the notice, will be sufficient, if the agent give the

to have been put in in due time. *Hilton v. Fairclough*, 2 Campb. 633.

(117) *Muilman v. D'Eguino*, antd, p. 229. note (33). To debt, on bond conditioned to pay certain bills drawn on India at sixty days' sight, in case they should be returned protested, defendant pleaded that he had not notice so soon as he should have had. It appeared that notice was sent by the first English ships, but that by the accidental conveyance of a foreign ship not bound for England, and by which the holder wrote to England upon other matters, notice might have been sent sooner, and would have arrived sooner; but Eyre C. J. told the jury, that notice by the first regular ships bound for England was sufficient, and that it was not necessary to send notice by the chance conveyance of a foreign ship. The jury found for the plaintiff, and the Court was satisfied with the verdict, and refused a new trial.

notice, or take due steps for the purpose, without delay. (118)

And it will be of no consequence though the notice by the agent be not quite so early as notice by the post would have been. (118)

A letter directed to a man at a large town, without specifying the part in which he lives, the trade he carries on, or any other circumstance to distinguish him, may be sufficient, if he be the drawer, and has dated the bill generally at that place. (119)

Or if, upon reasonable enquiry, no information can be obtained to enable the party to give a better direction.

But, *prima facie*, such a direction will be insufficient, because it is not likely, upon such a direction, the letter will reach the person for whom it is intended, in proper time. (120)

If, however, it be proved that there was a direc-

(118) See *Bancroft v. Holt*, ante, p. 277.

(119) *Mann v. Moss*, 1 Ryan & Moody, 249. Upon a bill dated generally "Manchester," the letter giving notice to the drawer was addressed to him generally at Manchester; and Lord Tenterden held it sufficient.

(120) *Walter v. Haynes*, 1 Ryan & Moody, 149. To prove notice to defendant, an indorser, it was proved that a letter containing notice, directed to "Mr. Haynes, Bristol," was put into the post-office in proper time. Abbott C. J. thought that, in so populous a place as Bristol, the direction was too general, as there might be many persons at Bristol of that name; and he considered there ought to be proof that the letter had reached the defendant: further proof was then given, and plaintiff had a verdict.

tory at the time for that place, and that a reference to the directory would have shown in what part of the place the person intended lived, such a direction might perhaps be held sufficient.

Where it is not known where a party lives, due diligence must in general be used to find out. (121) (122)

And where such diligence is unsuccessful, it will excuse want of notice. (121)

But merely enquiring at the house where a bill

(121) *Bateman v. Joseph*, 12 East's Rep. 433. In an action by an indorsee against the payee and first indorser of a bill, it appeared that the plaintiff received notice of its dishonour on the 30th of September, in time to give notice to the defendant on that day; he gave no notice, however, until the 4th of October; to excuse which, his clerk proved that the plaintiff did not know the defendant's residence until that day. Lord Ellenborough left it to the jury, whether the plaintiff had used due diligence to find the defendant's residence. They found for the plaintiff; and on motion for a new trial, the Court refused the rule, saying, whether due notice had been given was a question of law; but whether due diligence had been used, to discover the place of residence of a person entitled to notice, was a question of fact.

(122) *Beveridge v. Burgis*, 3 Campb. 262. In an action by the indorsee of a bill against the indorser, the excuse for not giving notice to defendant was, that plaintiff did not know his residence, but the only enquiry he proved was at the house where the bill was made payable. Sed per Lord Ellenborough, how could he expect information there? he might have enquired of other parties to the bill, or of persons of the same name in the directory: ignorance may excuse notice, but reasonable diligence must be used to obtain knowledge. Nonsuit.

is payable, is not due diligence for finding out an indorser. (122)

Enquiry should be made of some of the other parties to the bill or note, and of persons of the same name. (122)

Calling on the last indorser, and last but one, the day after the bill becomes due, to know where the drawer lives, and, on his not being in the way, calling again the next day, and then giving the drawer notice, may be sufficient. (123)

But if a party when he passes a bill or note decline saying where he lives, and undertake to call upon the acceptor to see if the bill is paid, he cannot complain of want of notice. (124)

Where the residence of a party entitled to notice

(123) *Browning v. Kinnier*, Gow. 81. Defendant indorsed to Newman, Newman to Maberly, Maberly to Chesterman, and Chesterman to plaintiff; the bill became due 23d November; on the 24th plaintiff applied to Chesterman to know where defendant lived; Chesterman could not tell, and referred him to Maberly; he called on Maberly at 4 p. m., but Maberly not being at home, he did not repeat his call till the next morning, and then Maberly gave him the information, and he gave defendant notice. Dallas C. J. thought reasonable diligence had been used, but he left the question to the jury, who were of the same opinion.

(124) *Phipson v. Kneller*, 4 Campb. 285. 1 Stark. 116. Plaintiff, the holder of a bill, asked defendant, the drawer, where he lived; he said, he had no regular residence, but lived amongst his friends, and he would call himself upon the acceptor, and see if the bill was paid. Lord Ellenborough held that this dispensed with all notice, and threw it upon defendant to enquire; and plaintiff had a verdict.

is unknown, and the person next to him upon the bill or note will give no information where he lives, a note addressed to the former, if sent to the place where such latter person lives, will be sufficient. (125)

Though the application for information be made before the bill or note is due. (125)

Especially if the person applied to has acted in any respect, with regard to the bill or note, as agent for the party entitled to notice. (125)

And, if the holder employ an attorney to give notice, and the attorney after a lapse of time discover where the party lives, he may take a day to apprise the holder, and take his further directions, before he gives the notice. (125)

(125) *Firth v. Thrush*, 8 Barn. & Cr. 387. Major drew a bill to his own order, dated Frome : he indorsed it to defendant ; by defendant's authority he indorsed it, in defendant's name, back again to himself, and then indorsed it to Swaine and Co., who indorsed it to plaintiff : before the bill became due, plaintiff applied to Swaine and Co. for information respecting defendant, but they could give him none : he and Swaine and Co. then applied to Major, and also to Miller (Major's attorney), who acted as attorney for defendant in this suit ; but they gave for answer, that plaintiff must not expect to get any thing from defendant, and were silent as to his place of residence. The bill became due 4th August, and was dishonoured : plaintiff employed Pownall to give notice ; and on 5th August he gave notice to Swaine and Co. and Major, and addressed a letter containing notice to defendant at Frome : that notice was returned 24th September, defendant not being found : plaintiff then directed Pownall to do all he could to find out defendant's residence ; Pownall wrote immediately to an attorney at Frome,

If a party entitled to notice become bankrupt, but assignees are not chosen, notice to him is sufficient ; there need not be any further notice when assignees are chosen. (126)

But if he have absconded, and assignees be chosen, and the holder know it, he must give notice to the assignees. (127)

Especially if the bankrupt's house be still open, and the messenger under the commission be in possession of it. (127)

and received an answer, the 16th October, that defendant lived at Burton. On the 17th Pownall informed plaintiff, and on the 18th wrote again to defendant, giving him notice ; and whether this notice was in time was the question. Lord Tenterden inclined to think that notice to Major was, under the circumstances, notice to defendant : but on rule nisi for a nonsuit, and cause shown, the ground on which he and the rest of the Court proceeded was, that there was no laches ; that all that could be expected was done when the bill was first dishonoured ; and that when Pownall received the information where defendant lived, he had a right to communicate it to his client, and take his directions upon it, and that he was entitled to a day for that purpose. Rule discharged.

(126) *Ex parte Moline*, 19 Ves. 216. The drawer of a bill became bankrupt : the bill was dishonoured the day of the second meeting under his commission, and notice was given him before the choice of assignees : it was insisted that notice should have been given to the assignees. *Scd per Lord Eldon C.*, " the notice was quite sufficient : the bankrupt represents his estate " till assignees are chosen."

(127) *Rohde v. Proctor*, 4 Barn. & Cr. 517. Five bills drawn by Rains on Lachlan became due in June 1818 ; Rains absconded and went abroad 17th April, 1818, and on the 20th a commission of bankruptcy issued against him, and defendants were his assignees 23d April, Lachlan became bankrupt.

Notice to one of several partners, is notice to all: and when a bill has been drawn by a firm upon one of the partners, and by him accepted and dishonoured, it is (128) unnecessary to give notice of such dishonour to the firm; for, this must necessarily be known to one of them, and the knowledge of one is the knowledge of all.

If the holder give due notice of the bill's dishonour, but intimate that he expects it will be paid in a given time, and that he will keep it that time without putting more expense upon it, unless the person written to object, it will be no answer to an action afterwards against the person written to, that he had no notice, upon the expiration of the extended time, of nonpayment. (129)

Rains's house continued open till after June: the messenger under the commission was in possession of it; and the holders knew that defendants were Rains's assignees; but no notice was given of the dishonour. Case from Chancery, on question whether the bills were proveable under the commission against the drawer, Rains?—The Court of King's Bench certified they were not.

(128) See *Porthouse v. Parker* and another, post, in which Lord Ellenborough held that the plaintiff was not bound to prove that the defendants had received express notice of the dishonour of the bill, assigning the reason mentioned in the text.

(129) *Foster v. Jurdison*, 16 East, 105. Indorsee against drawer. When payment was refused, plaintiffs apprised defendants thereof, but added, they had reason to believe a friend would advance the money for the acceptor in a few days, that they would therefore hold it till the end of the week without putting more expense upon it, unless they heard from defend-

The law does not require a second notice when the extended time expires. (129)

But, if the party written to, sustain any damage from not having such notice, he may perhaps be entitled to bring an action on that account. (129)

The (130) drawer of a bill, and every indorser of a bill or note, is, *prima facie*, to be presumed entitled to bring an action on paying it, and therefore entitled to insist on a want of notice, or on a neglect to make a proper presentment; but the contrary (131) may be proved.

And the representative of such drawer, &c. in case of death, bankruptcy, &c. stands in his place, and is equally entitled to notice.

And a surety, though not a party to a bill or

ant to the contrary; the bill was not paid, but no further application was made to defendant for near two months: action; and Wood B. being of opinion that plaintiff should have given a second notice at the end of the week, and the jury thinking that certain circumstances proved did not amount to a waiver of the want of such notice, verdict for defendant: but, on rule nisi for a new trial, and cause shown, the Court thought plaintiffs had done all the law merchant required by giving one notice; that they then, at the highest, made themselves agents for defendants, to endeavour to get payment, and if any damage resulted to defendant for want of notice, it might perhaps entitle him to call on defendant or his agent by action; but, that it was no defence to the action. Rule absolute.

(130) Vide *Bickerdike v. Bolman*, post, p. 294., note (140.), and *Rogers v. Stephens*, post, p. 291, note (137).

(131) *Bickerdike v. Bolman*, post, p. 294., note (140.); *Rogers v. Stephens*, post, p. 291., note (137.); and *Goodall v. Dolley*, post, p. 293., note (138).

note, may be discharged by want of notice and neglect to present, if it be probable he would otherwise have been safe (132) ;

As, if the parties who ought to have paid were solvent when the bill or note became due, and have failed since. (132)

But, a person not party to a bill or note cannot

(132) *Philips v. Astling*, 2 Taunt. 206. The declaration stated, that in consideration that the plaintiff would sell and deliver to Davenport and Finney certain goods, to be paid for by a bill to be drawn by Davenport and Finney on Houghton at six months, the defendants undertook to guaranty the payment of such bill. It then averred delivery of the goods, acceptance of the bill, its presentment for payment, and dishonour. At the trial, it appeared that Houghton was at sea when the bill became due, which was on the 14th of July, 1808, but, that he had an agent residing in London, authorised to accept bills, and who had accepted [this ; that no presentment for payment was made to this agent when the bill became due ; that on the 16th of July, the plaintiff gave Davenport and Finney notice that the bill remained unpaid, but no notice was given to the defendants. In February, 1809, Davenport and Finney became insolvent, and Houghton was declared a bankrupt in July, 1809, after which, payment was demanded of the defendants. A verdict was found for the plaintiff, but the Court, upon a rule nisi for a non-suit, after referring to *Warrington v. Furber* (*infra*), said, that here the insolvency of the drawers, and the bankruptcy of the acceptor, did not happen until long after the bill became due, and that for any thing that appeared, if the money had been demanded either of the drawer or acceptor, the bill might have been paid : but that the necessary steps not having been taken to obtain payment from the parties who were liable upon the bill, and solvent, the guaranty must be discharged, and therefore they made the rule absolute.

complain of laches, or want of notice, unless he can show it has done him prejudice. (133)

(133) *Warrington and another v. Furber and another*, 8 East, 242. The plaintiffs guaranteed the payment of the price, to the extent of 1000*l.*, of goods to be sold by one Martin to the defendants, at six months' credit. The goods were furnished, and the defendants accepted a bill at six months, for the value. This bill became due on the 3d of December, 1801; but on the preceding 21st of November the defendants became bankrupts. The plaintiffs were therefore obliged to pay the 1000*l.*, and now brought this action to recover the same. It was objected that the plaintiffs had not proved a presentment of the bill to the defendants for payment, without which, it was urged, that Martin could not have recovered against the plaintiffs, and therefore that the latter had paid the money in their own wrong. Lord Ellenborough held the proof unnecessary; this not being an action on the bill, and the defendants having been recently stripped of all their property; and the plaintiffs had a verdict. On rule nisi to set it aside, and cause shown, the Court held the verdict right: and Lawrence J. said, the guarantees were not prevented from showing that they ought not to have been called upon at all, for that the principal debtors could have paid the bill if demanded of them. Rule discharged.

Swinyard v. Bowes, 5 M. & S. 62. Action for goods sold. Defence, that plaintiff had drawn on Chesner, a debtor of defendant, for the amount, and had given defendant no notice of the dishonour of that bill: Chesner was bankrupt the week after the bill became due, and was not in a condition in the interim to pay it. Bayley J. thought the defendant not within the custom of merchants, because he was not party to the bill; and as he did not appear to have been prejudiced by the want of notice, the not giving it him furnished no ground of defence; and on motion for new trial, the Court thought him right, and refused a rule.

Holbrow v. Wilkins, 1 Barn. & Cr. 10. Defendants guaranteed half the amount of a bill due 29th October, 1818, drawn by plaintiff on Carver and Peat. — The 4th September, Carver and

And if he can prove it has done him prejudice, he can only recover to the extent of such prejudice. (134)

Therefore, each case will depend upon its own peculiar circumstances. (134)

Peat became insolvent, and 22d September plaintiff wrote to defendant to accept a bill at a month for the sum he guarantied; defendant refused; and after 29th October plaintiff sued defendant on his guaranty. Defendant insisted that he was discharged, because the bill on Carver and Peat had not been presented for payment, nor notice of its dishonour given. It appeared, however, that it would not have been paid if presented, and that defendant had sustained no damage by the want of presentment, or of notice. Verdict for plaintiff: motion for nonsuit, and *Philips v. Astling* (antè, p. 287.) was relied upon: *sed per Abbott C. J.*, there the insolvency did not happen till after the bill became due, which makes a material difference between the cases: here defendant knew before the bill became due, that Carver and Peat were insolvent, and that he should be looked to for payment. Rule refused.

(134) *Van Wart v. Woolley*, 3 Barn. & Cr. 439. Irving and Co., of New York, employed plaintiff to buy goods for them, and sent him a bill payable to his order, drawn by Cranston and Co. on Greg and Co., London. Plaintiff, who lived at Birmingham, delivered it to defendants, Birmingham bankers, to get it accepted; they sent it to Lubbock and Co., their town bankers, who presented it accordingly: the drawees refused to accept, but desired Lubbock and Co. to keep the bill till it was due, which they did. Lubbock and Co. gave no notice to defendants till payment was refused; and, when Irving and Co. had notice of nonpayment, they refused to take back the bill, on the ground of laches as to notice of non-acceptance. Plaintiff therefore sued defendants, and had a verdict for the amount of the bill; but it appearing that Cranston and Co. had no effects in Greg and Co.'s hands, and had become bankrupts before the presentment for acceptance, the Court, on time to consider,

And the questions in each case will be, whether there has been any prejudice, and what. (134)

An agent, employed to present a bill for acceptance or payment, will be answerable (134) to his employer for any neglect in presenting or giving notice. (134)

And so will an agent who is employed to get it presented, if he take a commission for so doing, and have an agent in the place where it is to be presented. (134)

But if the agent so employed have no commission for getting it presented, nor any agent where the presentment is to be, he is not answerable for the neglect of the person he employs. (134)

If the person who ought to have paid the bill or note were insolvent when it should have been paid, (133) the presumption is, that the neglect did not prejudice him.

In an action on a bond from the drawer or indorser of a bill, conditioned to pay it in a limited time after it becomes due if the acceptor do not, it

held the verdict, as to the quantum, wrong; for, as Irving and Co. had not indorsed the bill, they were not within the custom of merchants as to notice, and could only complain to the extent to which they were damaged; that, as plaintiff stood merely in the character of agent for them, and had done his whole duty as such agent, they could not throw the loss upon him; and though plaintiff must be considered as having suffered some injury by having his recourse upon Cranston and Co. delayed, he would only be entitled to nominal damages in that respect, unless he could prove actual damage, and then his recovery would be limited by the amount of such damage.

is no defence that the bill was not duly presented for payment. (135)

Or that due notice of its dishonour was not given to the defendant. (135)

Payment of (136) part, or (137) a promise to

(135) *Murray v. King*, 5 Barn. & Cr. 165. In an action against the payee of a bill, on a bond from him and the drawer to pay the bill in a month after it became due, if the acceptor did not, defendant pleaded that the bill was not duly presented for payment, and secondly, that defendant had not due notice of its dishonour. Plaintiff replied, that the acceptance was a forgery; and defendant rejoined, that he did not know that, when the bill became due. Plaintiff demurred; and, on argument, the Court held the pleas bad; for, the condition was silent as to the presentment and notice; and, had it been intended that a neglect as to presentment or notice should have avoided the bond, the obligors should have taken care to have words to express that intention.

(136) *Vaughan v. Fuller*, Str. 1246. In an action against the indorser of a note, it being proved that the defendant had paid part, Lee C. J. held, that *that* made the proof of a demand upon the maker unnecessary. See *Lundie v. Robertson*, *Horford v. Wilson*, *Gibbon v. Coggon*, and *Potter v. Rayworth*, post.

(137) *Rogers v. Stephens*, 2 Term Rep. 713. In an action against the drawer of a foreign bill, an objection was taken that there was no protest; but it appearing that the defendant had no effects in the hands of the drawees when the bill was drawn or afterwards, and that, on being pressed for payment by the plaintiff's agent after the bill was dishonoured, he had said, it must be paid; Lord Kenyon thought a protest or notice unnecessary, and directed the jury to find for the plaintiff, which they did: a rule was afterwards granted, to show cause why there should not be a new trial, and it was stated *then*, and upon the showing cause, that the defendant had really been prejudiced by the want of notice, to the amount of the bill; that he had advanced money to one Calvert to the amount before

pay after full notice of the default, sufficiently evinces that the party could not have sued on

the bill was drawn; that Calvert desired him to draw on the drawees as Calvert's agents; that he did so, on a supposition that Calvert had effects in their hands; that he afterwards settled with Calvert, and upon a reliance that the bill was paid, delivered him up effects to more than the value of the bill; and that Calvert was since insolvent; that the defendant was prepared with evidence to this effect, but, that Lord Kenyon delivered it as his opinion, that it did not make a protest or notice necessary; Lord Kenyon did not recollect that this evidence was offered, but he and all the Court thought it answered by the defendant's admission that the bill must be paid; because, that was an admission that the plaintiff had a right to resort to him upon the bill, and that he had received no damage by the want of notice, and was a promise to pay. The rule was discharged.

Anson v. Bailey, Bull. N. P., 276. The indorsee of a note presented it for payment, but the maker pretended that the payee had promised not to indorse it over without acquainting him, and so put off the indorsee from time to time for three weeks; at the end of that period the indorsee wrote twice to the payee, stating what he had done, and the maker's excuse; the payee answered, that when he came to town he would set the matter right; and upon an action by the indorsee against the payee, the jury found for the plaintiff, though the maker became bankrupt before the second letter was written, and though he continued solvent for three weeks after the note was due.

Wilkes v. Jacks, Peake, 202. In an action against Jacks as indorser of a bill drawn by Vaughan on Eustace and Holland, it appeared that notice had not been given to the defendant, upon which the plaintiff offered to show that Vaughan had no effects in the hands of Eustace and Holland; sed per Lord Kenyon, "That circumstance will not avail plaintiff; the rule extends only to actions brought against the drawer; the indorser is in all cases entitled to notice, for he has no concern

paying the bill or note, and consequently that he cannot insist on want of notice, or of a neglect to present; a payment or promise without notice of the default does (138) not.

“ with the accounts between the drawer and the drawee.” The plaintiff then proved a letter from the defendant acknowledging the debt, and promising to pay, and upon *that* he had a verdict.

(138) *Blesard v. Hirst* and another, Burr. 2670. The defendants indorsed a bill to the plaintiff, and he indorsed it over; his indorsee presented it for acceptance a month before it was due, and acceptance was refused; it was afterwards presented for payment, and payment was refused, of which notice was given to the defendants, but they had no notice of the refusal to accept. The drawer was a bankrupt before the bill was due, but he continued in credit three weeks after the presentment for acceptance. Three days after the notice, one of the defendants called on the plaintiff at Bradford, on his way to Leeds, and said he would take up the bill as he returned; but on his return he said he was advised he was not bound to do it, upon which this action was brought; and on a case reserved the Court held, that though the holder might not have been obliged to present the bill for acceptance, yet, as he did so present it, he ought to have given notice of the refusal, and that by not doing so he had taken the risk upon himself; and notwithstanding the promise of one of them, the defendants had judgment.

Goodall v. Dolley, 1 Term Rep. 712. A bill drawn in favour of the defendant, payable the 11th of January, 1787, was presented for acceptance by the plaintiffs the 8th of November, 1786, when acceptance was refused: they gave no notice to the defendant till the 6th of January, and then did not say when the bill was presented; upon which the defendant proposed paying by instalments, but the plaintiffs rejected that offer, and brought this action. Heath J. thought the defendant discharged for want of notice, and that his offer to pay, being made under an ignorance of the circumstances, was not binding; and the jury, under his direction, found a verdict for the de-

The drawer is not entitled to notice of nonpayment by the acceptor, if the bill were accepted for the drawer's accommodation. (139)

And if the drawer make the bill payable at his own house, this circumstance is evidence that the acceptance was for his accommodation. (139)

Proof that the drawer had no effects in the hands of the drawee from the time the bill was drawn until it became payable, is sufficient (140), at least

fendant. Upon cause shown against a rule for a new trial, the Court thought the direction and verdict right, and discharged the rule.

See *Lundie v. Robertson*, *Horford v. Wilson*, *Gibbon v. Coggon*, and *Potter v. Rayworth*, post.

(139) *Sharp v. Bailey*, 9 Barn. & Cr. 44. In an action against the drawer of a bill, it appeared that the bill was in his handwriting, and that he made it payable at his own house. There being no proof of notice to defendants of its dishonour by the acceptor, *Littledale J.* thought that the making the bill payable at his own house was evidence that it was an accommodation acceptance, in which case the notice would not have been necessary, and he left that question to the jury, who found for the plaintiff: and on motion for a new trial *Lord Tenterden* said, he could not understand why plaintiff should make the bill payable at his own house, unless he was to provide for it at maturity. He thought the point correctly presented to the jury, and that there was no reason to find fault with their verdict. Rule refused.

(140) *Rogers v. Stephens*, *antè*, p. 291. note (137).

Bickerdike and another, assignees of *Reichard*, v. *Bollman*, 1 Term Rep. 405. The only question upon a case reserved was, whether a bill the bankrupt had drawn in favour of the petitioning creditor, upon a man, who then and from that time till the bill became due was one of the bankrupt's creditors, had discharged so much of the petitioning creditor's debt, no

prima facie, to show, that the drawer would not be entitled to bring an action on paying the bill, and has therefore no right to insist on the want of no-

notice having been given of its dishonour to the bankrupt? and the Court, after argument, were of opinion it had not; because, the reason why notice is in general necessary, is, that the drawer may without delay withdraw his effects from the drawee, and that no injury may happen to him from the want of notice; but, where the drawer has no effects in the hands of the drawee, he cannot be injured, and is not entitled to any notice.

Goodall v. Dolley, *antè*, p. 293. note (138). In this case, upon the application for a new trial, the plaintiff's counsel offered an affidavit that the drawer had no effects in the hands of the drawee; but the Court thought *that* made no difference, the action being brought against the payee; but by Buller J., "Had the action been against the drawer I should have been willing to let in the affidavit; that would be like the case of *Bickerdike v. Bollman*; if the drawer has no effects in the hands of the drawee, he cannot be injured by want of notice."

Legge v. Thorpe, 12 East's Rep. 171. Action by an indorsee against the drawer of a foreign bill, drawn upon C. B. Wyatt, payable one month after sight; acceptance had been refused. The declaration negatived effects in the hands of the drawee, or any consideration for the bill. It appeared at the trial that the defendant had no effects in Wyatt's hands, and that the latter had therefore refused acceptance; but that Wyatt was one of the executors of Weeks, and that Weeks's executors had desired the defendant to employ the payee of this bill to do some carpenter's work on Weeks's property, and the defendant therefore drew this bill on Wyatt to settle with the payee. Wyatt denied that he had assets to pay the bill. The only question was, whether a protest for non-acceptance were necessary. Lord Ellenborough thought not, and a verdict was given for the plaintiff, but the point was reserved; and on a rule nisi for a nonsuit, and cause shown, the whole Court held that this case was governed by those of *Bickerdike v. Bollman*, and *Rogers v. Stephens*, and discharged the rule.

tice, &c. and it (141) has been doubted whether the drawer would be at liberty to show the contrary.

But that doubt seems to be unfounded. (142)

It is no excuse for not giving notice to the drawer, that he had no effects in the drawee's hands when the bill was drawn or became due, if he had effects on their way to the drawee. (143)

Unless the drawer get back those effects, and would stand indebted in the amount to the drawee, if the drawee paid the bill.

(141) In *Rogers v. Stephens*, ante, p. 291. note (137), Mr. J. Ashhurst said, "Admitting the proof offered had been given, "I do not think it clear it would take the case out of the common rule; for, the law being now established, that notice to "the drawer of a non-acceptance is not necessary where he has "no effects in the hands of the drawee, when the plaintiff found "the drawees of this bill had none of the defendant's effects in "their hands, he knew he was not bound by law to give the "defendant notice; he was not bound to take cognizance of "any private transaction between the drawer and a third person not appearing on the face of the bill."

(142) *Rucker v. Hiller*, infra. *Ex parte Heath*, post. *Correy v. Scott*, post. *Robins v. Gibson*, post.

(143) *Rucker v. Hiller*, 3 Campb. 217. 16 East, 43. In an action by the indorsee of a bill against the drawer, it appeared that the drawer had no effects in the drawee's hands, but that he had shipped goods which were on their way to the drawee: the drawee refused to accept, but no notice thereof was given to the drawer; and it was insisted, that as the drawee had not received effects, defendant was not entitled to notice: Lord Ellenborough thought otherwise, as the drawer was in expectation that the goods he had shipped would reach the drawee; nonsuit: on motion to set aside the nonsuit, it did not appear

It is no excuse for not giving notice to the drawer, that he had no effects in the drawee's hands, if the drawer would be entitled on taking up the bill to sue either the acceptor (144);

Or any other party (145);

As, if the bill were drawn for the accommodation of the acceptor (144);

Or drawn and accepted for the accommodation of the payee, or a subsequent indorsee. (145)

but that the drawer might have been prejudiced by want of notice, and the rule was refused. See n. (146.)

(144) *Ex parte Heath*, 2 Vez. & Beam. 240. 2 Rose, 141. Upon application by the indorsee of a bill to be allowed to prove against the drawer, it was urged as an excuse for not giving notice of dishonour to the drawer, that he had no effects in the acceptor's hands, and was therefore not entitled to notice: it was answered, that there were various transactions between the drawer and acceptor, and that the result of the transactions was accommodation to the acceptor; and, per Lord Eldon, "if a bill were accepted for the accommodation of the drawer, and there were nothing but that bill between them, notice would not be necessary, the drawer being, as between him and the acceptor, first liable; but if bills were drawn for the accommodation of the acceptor, the transaction being for his benefit, there must be notice without effects; and if in the result of various dealings, the surplus of accommodation is on his side, he is, with regard to the drawer, in the situation of an acceptor having effects: and the failure to give notice may be equally detrimental." He accordingly directed an enquiry, but noticed, that upon the complication which existed in the case, it was upon the petitioner, the indorsee, to prove there was not what the law calls "effects."

(145) *Corey v. Scott*, 3 Barn. & Ald. 619. Indorsee against drawer, on bill drawn by defendant on Gordon, and accepted by him, payable to defendant, indorsed by him to Lough, and

It is no excuse for not giving notice to the drawer that he had, in fact, no funds in the hands of the drawee, if he had made a provision to have such funds there, and might reasonably expect they were there. (146)

As, if he drew upon a cargo he shipped for this kingdom, and such cargo were in the hands of a broker, who was to pay the proceeds to the drawee. (146)

by Lough to plaintiff: no evidence of notice to defendant; excuse that defendant had no effects in Gordon's hands: answer, that Lough was to provide for the payment, and that both Gordon and defendant, Scott, lent their names to accommodate him. Abbott C. J. thought this rebutted the excuse from want of effects; and nonsuit: and on rule nisi to enter verdict for plaintiff, and cause shown, the Court were clear defendant was entitled to notice; for, had he taken up the bill he might certainly have sued Lough, if not Gordon; he was, therefore, in a situation in which want of notice might have hurt him; and if so, he was entitled to notice: rule discharged.

Norton v. Pickering, 8 Barn. & Cr. 610. In an action against the drawer of a bill, no notice of the dishonour had been given to the defendant, but plaintiff proved that defendant had no effects in the hands of the drawee: it appearing, however, that the drawer and acceptor had merely lent their names to the first indorsee, and that the drawer would therefore have been entitled to a remedy over against the first indorsee, had he, the drawer, paid the bill, Bayley J. held the want of notice not excused, and nonsuited the plaintiff; and on motion to enter a verdict for plaintiff, the Court thought the nonsuit right, and refused a rule.

(146) *Rohins v. Gibson*, 3 Campb. 334. To excuse want of notice to the drawer of a foreign bill, the drawee proved that he had in fact no funds of the drawer in his hands from the time the bill was given till its becoming due: but he said the bill

If the drawer had effects in the hands of the drawee at the time when the bill was drawn, it has been held he (147) is entitled to notice of non-

was drawn on a cargo shipped by the drawer for England, that the cargo was in the hands of a broker for sale, and when it was sold, the proceeds were to be paid to him to answer the bill; and Lord Ellenborough held, that under these circumstances, as the bill was drawn on expected funds, the drawer was entitled to notice: plaintiff then proved notice, and had a verdict.

And see 1 Bos. & Pull. 655.; and 12 East, 175.

(147) *Orr v. Maginnis*, 7 East, 359. In an action by the payees against the drawer of a foreign bill, payable at ninety days after sight, the declaration averred presentment for acceptance and refusal, presentment for payment and refusal, and protest for nonpayment; it then averred, that at the time of making the bill, and from thence until presentment for payment, the defendant had no effects in the hands of the drawees. At the trial it appeared, that at the time of *drawing* the bill, the defendant had effects in the hands of the drawees, but to what amount did not appear: but that when the bill was presented for acceptance, and thence until presentment for payment, he had not any. The bill was only noted for non-acceptance, but was protested for nonpayment: no notice of non-acceptance was given to the defendant. The plaintiffs had paid the amount of the bill to an indorsee. They were nonsuited for want of proving protest for, and notice of, non-acceptance. On motion to set aside the nonsuit, *Bickerdike* and *Bollman*, and other cases, were cited to show that no notice, and therefore no protest, was necessary. But Lord Ellenborough said, that that case went on the ground that there were no effects in the hands of the drawee at the time when the bill was drawn; and the other cases followed on the same ground; but that no case had extended the exemption to cases where the drawee had effects of the drawer's in his hands at the time when the bill was drawn, though the balance might vary afterwards, and be turned into the opposite scale. Rule refused.

acceptance ; although at the time when the bill was presented for acceptance, and from thence until presentment for payment, he had not any.

So, if he had effects in the hands of the drawee, when the bill was presented for acceptance, it has been held he will be entitled to notice of non-acceptance (148), although he were indebted to the drawee greatly beyond the amount of such effects.

Notice to the drawer is not necessary, though he had supplied the drawee with goods, if those goods were supplied upon a credit which had not expired, and the drawer could entertain no reasonable expectation that the drawee would pay the bill (149) ;

And could have no remedy against him for not doing so. (149)

(148) *Blackhan v. Doren*, 2 Campb. N. P. C. 503. This was an action against the drawer of a bill for 250*l.* payable after sight ; of which acceptance had been refused : and to excuse the want of notice of non-acceptance, it was proved that when the bill was presented, though the drawer had effects in the hands of the drawees to the amount of 1500*l.*, yet that he owed them 10,000*l.* or 11,000*l.*, and that they had appropriated the effects to go in satisfaction of this debt : this appropriation, however, was without the defendant's privity. Lord Ellenborough held, that a notice was necessary, and nonsuited the plaintiff.

(149) *Claridge v. Dalton*, 4 M. & S. 226. Defendant drew upon Pickford for 300*l.* at two months after date. The date was 29th June. Defendant had supplied Pickford with goods to the amount of 200*l.*, and between June and September he supplied him with 70*l.* worth more ; but, according to their course of dealing, the goods were to be paid for by acceptance at the

The drawer is entitled to notice, though he had no effects in the hands of the drawee at the time the bill was drawn, or at the time it was accepted, if he had before it became due. (150) (151)

And it has been held that the drawer is entitled to notice, if he has any effects in the hands of the drawee at the time the bill becomes due. (151)

Though such effects be not equal to the sum in the bill. (151)

And if there be several bills in the hands of the same owner, becoming due on different days, the drawer is entitled to notice as to each, though the effects in the drawee's hands be not equal to any of the bills. (151)

And a neglect to give notice will discharge the drawer as to all. (151)

end of the year. Defendant, being sued by an indorsee, insisted upon want of notice : but on point saved, the Court held, that under the circumstances, as he had no ground for expecting that Pickford would pay the bill, and as notice could have done him no service, he had no right to object to the want of it : and rule nisi for nonsuit discharged.

(150) *Hammond v. Dufresne*, 3 Campb. 145. Action against drawer on bill for 301*l.*: proof, that at the time the bill was drawn and accepted, defendant had no effects in the hands of the drawees ; but it appearing, that before the bill became due he paid 400*l.* for them, Lord Ellenborough held want of notice not excused : and nonsuit.

(151) *Thackray v. Blackett*, 3 Campb. 164. Plaintiff had two bills for 1839*l.* each, drawn by defendant on Preston and Co., due the 13th and 20th of April, 1810 ; they were accepted, but before they became due, they were, by mistake, destroyed by Preston and Co. : plaintiff applied to defendant for new bills in

It is no excuse for not giving notice to the drawer, that the bill, before it became due, had been accidentally destroyed, and that he had refused to give a new bill according to 9 & 10 W. 3. c. 17. (151)

The drawee's insolvency is no excuse for not giving notice. (151)

Though notice to the drawer may be dispensed with, where it is shown he had no effects in the hands of the drawee, nor any right to expect payment by him, yet, evidence (152) cannot be received

their stead, according to 9 & 10 W. 3. c. 17., but defendant would not give them. Preston and Co. became insolvent before April, 1810, owing defendant 1000*l.*: the bills had been drawn for defendant's accommodation, but during their currency defendant came under engagement for Preston and Co., which created the debt from them of 1000*l.* On the 13th and 20th of April, 1810, payment of each sum was demanded of Preston and Co. and refused, but no notice thereof was given to defendant. Lord Ellenborough thought defendant entitled to notice as to each sum, and discharged by want thereof as to each, and nonsuited plaintiff, and B. R. refused to set aside the nonsuit.

(152) *Dennis v. Morrice*, 3 Esp. N. P. C. 158. In an action on a bill, brought by an indorsee against the drawer, it appeared that no notice had been given to the defendant of nonpayment by the acceptor: to excuse which the plaintiff offered to prove, that, in fact, the defendant had not been prejudiced by the want of such notice. But Lord Kenyon said, the only case in which notice is dispensed with, is where the drawer had no effects in the hands of the drawee. This would be extending the rule still further than ever has been done, and opening new sources of litigation, in investigating whether, in fact, the drawer did receive a prejudice from the want of notice or not. He rejected the evidence, and nonsuited the plaintiff.

for the purpose of showing that the drawer has not, from the insolvency of the drawee, or other causes, been prejudiced by the want of such notice.

It is no excuse for not presenting a bill in due time, and giving notice to the drawer, that the acceptor had told the drawer he could not take up the bill and the drawer must, and that the acceptor had given the drawer part of the amount for that purpose. (153)

But the money so given may be recovered by the holder of the bill against the drawer as money had and received to the holder's use. (153)

It is (154) no excuse for not giving notice to the

(153) *Baker v. Birch*, 3 Campb. 107. In an action against the drawer of a bill for 23*l.*, it appeared, that before it became due the acceptor told defendant he could not pay it, but defendant must, and that he gave him five guineas towards it; but the bill was not presented for payment till some days after it became due, nor was proper notice given of its dishonour; and Lord Ellenborough held defendant discharged upon the bill for want of notice, but he thought plaintiff entitled to recover the five guineas, as so much money received to his use; and verdict accordingly.

(154) *Clegg v. Cotton*, 3 Bos. & Pull. 239. Indorsees against the drawer of a bill. The bill was drawn in America on Cullen, of Liverpool, in favour of Miller and Robertson, and by them indorsed to Booth and Co., and it afterwards came to the plaintiff's hands. It was dated in 1794, and drawn at ninety days' sight. In 1800, the defendant having other effects of Cullen's in his hands, deposited them with Miller and Robertson, and Booth and Co., on an undertaking from them that they would return these effects whenever it should appear that they were exonerated from this bill. Cullen afterwards became bankrupt: the defendant was arrested, and then said that he

drawer, that on an apprehension that the bill would be dishonoured, he lodged other money, which he had of the drawee's, in the hands of the indorser, on an undertaking by the indorser, that he would return it whenever it should appear that he was exonerated from the bill; for, his having other money of the drawee's does not entitle him to apply it to the dishonoured bill, unless he has due notice of the dishonour.

Nor (155) is it any excuse for not giving notice,

should apply to Cullen's assignees to bail him, for he had lodged property in America to answer the bill, and if he were discharged by want of notice, he should pay it over to them. Acceptance and payment were both refused, but no notice was ever given of it to the defendant. *Chambre J.* nonsuited the plaintiff on the ground that the defendant was discharged for want of notice: and on rule nisi to set aside the nonsuit, and cause shown, the Court held, that the special circumstances did not excuse the want of notice; that there was no fraud in the defendant, which was the ground of the rule for dispensing with notice; and that when Miller and Robertson, and Booth and Co. were exonerated, which they also were by want of notice, the money deposited with them belonged to Cullen's assignees. Rule discharged.

N. It did not appear that the defendant had got back the property which he deposited, but that circumstance was not relied on.

(155) *Staples v. Okines*, Esp. 332. In an action against the drawer of a bill, the defence was, want of notice; the plaintiff thereupon called the acceptor, who proved that when the bill was drawn he was indebted to the defendant in more than the amount of the bill, but that he then represented to the defendant that it would not be in his power to provide for the bill when it should become due, and that it was therefore then understood between them, that the defendant should provide for

&c. to the drawer of a bill, if he had effects in the hands of the drawee, that the drawee represented to the drawer, when the bill was drawn, that he should not be able to provide for it, and that the drawer thereby understood that he should have to provide for it.

It is no excuse for not presenting for payment, that defendant, the drawer, told the holder, the day the bill was due, that he hoped the bill would be paid, that he would see what he could do, and endeavour to provide effects (156);

And though the drawee said the preceding day that he had no effects. (156)

It has been holden, that if the drawer had no effects in the hands of the drawee, though the payee had, and the bill were drawn for accommodation of the payee, the drawer is not entitled to

it, and it was contended that this superseded the necessity of giving the defendant notice; but Lord Kenyon held it did not, and nonsuited the plaintiff.

(156) *Prideaux v. Collier*, 2 Stark. 57. In an action against the drawer, on a bill due 23d May, it appeared that plaintiff, the holder, applied to the drawee the 22d, and received for answer that he had no effects, but the drawer would probably provide them: the next day plaintiff saw the drawer, who said he hoped the bill would be paid, he would see what he could do, and endeavour to provide effects: plaintiff did not present the bill that day, and on question whether his neglect was excused, Lord Ellenborough held it was not, and plaintiff was nonsuited.

notice; at least, that he is not entitled on the ground of the payee's effects (157);

But, inasmuch as the drawer of a bill for accommodation can, on paying the bill, sue the person for whose accommodation it was drawn, the drawer would, according to several decisions (158), be, under such circumstances, entitled to notice.

Proof that the drawer had no effects in the hands of the drawee, nor any ground to expect payment by him, is no evidence that the payee or any of the indorsers could not have brought an action on paying the bill, and therefore does not excuse the want of notice to them. (159)

If the payee of a note lend his name merely to give it credit, and to enable the maker to raise money upon it, and know at the time that the

(157) *Walwyn v. St. Quintin*, 1 Bos. & Pull. 652. In an action by indorsee against the drawer of a bill, it appeared to have been drawn to accommodate the payee, who had placed securities to raise money in the hands of the drawee. The defendants had no effects in the hands of the drawee; and no notice having been given to him of the dishonour of the bill, the question was, whether that were made necessary by the payee's having effects in the hands of the drawee? Eyre C. J. directed a verdict for the defendant, with liberty to the plaintiff to move to enter a verdict for him. After rule nisi accordingly, cause shown, and time taken to consider, the Court held, that the defendant was not entitled to notice. But *postea* to the plaintiff on another ground.

(158) *Corey v. Scott*, *antè*, p. 297.; *Norton v. Pickering*, *antè*, p. 298.; *Brown v. Maffey*, *post*, p. 309.

(159) *Goodall v. Dolley*, *antè*, p. 293. 295.; *Wilks v. Jacks*, *antè*, p. 292.

maker is insolvent, it has been holden that he (160) is not entitled to notice, and that it (160) is no defence for him that the note was not properly presented for payment.

(160) *De Berdt v. Atkinson*, 2 H. Bl. 396. In an action against the payee of a note, it appeared that the note was not presented for payment till the day after it became due, and that no notice was given to the defendant till five days after such presentment; but it also appearing that the defendant gave no value for the note, that he lent his name merely to give it credit, and that he knew, at the time, that the maker was insolvent, Eyre C. J. directed the jury to find for the plaintiff, which they did. A rule to show cause why there should not be a new trial was afterwards granted, and upon cause shown, per Eyre C. J. "If the maker is not known to be insolvent, insolvency will not excuse the want of an early demand; but knowledge excludes all presumption, which would otherwise arise; here the money was to be raised upon the defendant's credit; he meant to guarantee the payment, and no loss could happen to him from the want of notice." And per Buller J. "The general rule is only applicable to fair transactions, where the bill or note has been given for value in the ordinary course of trade; it is said insolvency does not take away the necessity of notice; that is true where value has been given, but no further; here the defendant lent his name merely to give credit to the note, and was not an indorser in the common course of business." Heath and Rooke Js. concurring, the rule was discharged.

The Court appears to have proceeded upon a misapplication of the rule which obtains as to accommodation acceptances; in those cases the drawer, being himself the real debtor, acquires no right of action against the acceptor, by paying the bill, and suffers no injury from want of notice of non-payment by the acceptor. But in this case the maker was the real debtor, and the payee a mere surety, having a clear right of action against the maker, upon paying the note; and therefore entitled to notice to enable him to exert that right.

But inasmuch as the payee, in that case, would, upon paying the note, have a clear right of action upon the note, against the maker, it would seem that he is entitled to notice of the dishonour, or to make non-presentment in time a ground of defence; and it was soon afterwards held, that where the payee of a note lent his name merely to guarantee a debt from the maker, and expected it would not be paid, and had desired the banker at whose house it was payable to send it to him and he would pay it, he was discharged by a neglect to present in proper time (161); and in a later case, where the

(161) *Nicholson v. Gouthit*, 2 H. Bl. 609. Gouthit and Burton undertook to guarantee an instalment on the debts of Greens, and for that purpose Greens drew notes payable to Gouthit at Drury and Co.'s, which Gouthit and Burton indorsed, after which they were delivered to the creditors. Before they became due Gouthit enquired at Drury and Co.'s if they had any effects, and on their saying they had not, he desired them to send the notes to him, and he would pay them; many notes were accordingly presented and paid, but the note in question not being presented till three days after it was due, Gouthit refused to pay it. Burton had supplied him with money to take up all the notes, but as this was not presented when due, he had returned the money destined to pay it. An action was brought against Gouthit; and upon the trial, Eyre C. J. thought, as he knew the note would not be paid at Drury and Co.'s, and had provided money for it, and as his indorsement was by way of guarantee, he was not injured by the delay; and that the request to send the notes to him was either a waiver of notice, or notice by anticipation; but on a rule nisi to enter a nonsuit, and cause shown, though he thought the justice was clearly with the plaintiff, he thought he could not recover, for though the indorsement was by way of guarantee, it was liable to all the

name was lent to give the maker credit with his bankers, the Court thought notice to the payee essential. (162)

And in a (163) subsequent case, where a bill

legal consequences of an indorsement, and Gouthit's promise to pay was only to pay such as should be duly presented at Drury's. Heath and Rooke Js. were of the same opinion, and the rule was made absolute.

(162) *Smith and others v. Beckett*, 13 East's Rep. 187. In an action against the payee and indorser of a note, drawn by Canning, dated the 28th of October, 1809, and payable on demand; it appeared that the defendant had lent his name to this, and other notes, merely to enable Canning to obtain credit with the plaintiffs, his bankers, he having then lately stopped payment, which was well known to all the parties. The plaintiffs made advances for six months upon these notes, which advances they afterwards renewed without any communication with the defendant. On the 28th of May, 1810, Canning became bankrupt, and payment from him was afterwards demanded and refused; but no notice of this dishonour was given to the plaintiffs. Lord Ellenborough thought a notice necessary, and therefore nonsuited the plaintiffs. And on a motion to set aside the nonsuit, *De Berdt v. Atkinson* was cited; but the Court held clearly that a notice was necessary, especially as the advances had been renewed without the defendant's knowledge. Rule refused.

(163) *Brown v. Maffey*, 15 East, 216. Action on a bill drawn by Whitmarsh on J. and H. Neale, payable to Fiander or order, indorsed by Fiander to the defendant, by the defendant to Cosier, by Cosier to Wood, and by Wood to the plaintiff. The bill was drawn for Wood's accommodation, and all the prior names were lent to him. It did not appear that the defendant knew that any name was lent, except his own. The bill was dishonoured, but notice of the dishonour was not sent to the defendant. Bayley J. thought the notice necessary; because, if the defendant had paid the bill, he would have been entitled at least to have sued Wood, and therefore nonsuited

was drawn for the accommodation of a remote indorsee, and the names of all the prior parties were lent to him, it was holden, in an action against one of those parties, an indorser, that the latter was entitled to notice of the dishonour of the bill; because, upon paying it, he would be entitled to sue such indorsee for repayment.

But if the payee of a note lend his name, and take effects of the drawer to answer it (164), he is not entled to notice; because, he is the proper person to pay it, and would be entitled to no remedy over on making the payment.

It is no excuse for not giving notice to the payee, that the drawer and drawee are non-existing persons, and that their names were used for the purpose of fraud; unless the payee were privy to the fraud (165);

the plaintiff. A rule nisi was granted to set aside the nonsuit, and *De Berdt v. Atkinson*, and *Sisson v. Tomlinson*, 1 Selwyn's Ni. Pri. 357. n. were cited; but on cause shown, the Court thought it clear that the defendant was entitled to notice. Rule discharged.

(164) *Corney v. Da Costa, Espinasse*, 302. *Da Costa and Co.* compounded with their creditors, and to secure the composition, drew notes in favour of the defendant, which he indorsed to the creditors. The defendant took effects of *Da Costa and Co.*, at the time, to the amount of the composition; and an action being brought against him upon one of these indorsements, he insisted that he had no notice of the non-payment of the note until five weeks after it was due; but Buller J. held he was not entitled to notice, and the plaintiff had a verdict.

(165) *Leach v. Hewitt*, 4 Taunt. 731. Cattle drew a bill in

So it is no excuse that there was a parol agreement between plaintiff and defendant, that payment should not be demanded till certain estates were sold. (166)

Upon an acceptance payable at a banker's, notice of non-payment need not be given to the acceptor ; for, he makes the bankers his agents ; presentment to them is presentment to him, and refusal by them is refusal by him (167) ;

Especially where what he has in their hands when the bill becomes due is so much below the amount of the bill, that he could have no reasonable expectation they would pay it. (167)

And it makes no difference, though he had enough in their hands when the bill was drawn. (167)

the name of Rogers, Crooke, and Co., upon Rogers and Co., 83. Lombard Street, payable to defendant or order, and got defendant to indorse it : there were no such houses as Rogers, Crooke, and Co., or Rogers and Co., but Cattle used those names for the purpose of fraud. Action against defendant by a *bonâ fide* holder ; defence, want of notice : Mansfield C. J. told the jury, that if defendant was a party to the fraud, he was not entitled to notice, but if he acted innocently, he was : the jury thought he acted innocently, and nonsuit : and on motion for new trial, the Court held him entitled to notice, and rule discharged.

(166) *Free v. Hawkins*, post.

(167) *Smith v. Thatcher*, 4 B. & A. 200. Drawer against acceptor on a bill for 300*l.*, accepted payable at Messrs. Coutts and Co.'s : no proof was given of notice to defendant when the bill was dishonoured ; but it appeared, that though he had 712*l.* at Coutts's when the bill was drawn, he had only 41*l.* when the bill became due, and on the ground of the inadequacy of that

So upon a note payable at a banker's, notice of non-payment need not be given to the maker. (168)

A person who has been once discharged by laches from his liability on a bill or note, is always discharged. And, therefore, where two or more parties to a bill or note have been so discharged, but one of them, not knowing of the laches, pays it, he pays it in his own wrong, and (169) cannot recover the money from another of such parties.

sum to pay the bill, Bayley J. directed a verdict for plaintiff. On motion for a new trial, Abbott C. J. expressed a strong doubt whether notice need, in any case, be given to the acceptor, because the banker was his agent; but he and the other Judges held, that where the effects were insufficient, as here, notice was not necessary. Rule refused.

Treacher v. Hinton, 4 B. & A. 413. Indorsee against acceptor, on bill addressed to defendant at Plymouth, and accepted by him, payable at Sir John Lubbock and Co.'s, bankers, London. Plaintiff proved the acceptance, and presentment at Sir John Lubbock's, but there being no evidence of notice to defendant of the bill's dishonour, Abbott C. J. nonsuited plaintiff, with leave to move to enter a verdict for plaintiff: rule nisi accordingly; and on cause shown, the Court thought the notice not necessary; that the acceptance was not a cheque upon the banker, but merely made the banker the acceptor's agent, and then it was for him to see that his agent did his duty.

(168) *Pearse v. Pemberthy*, 3 Campb. 261. Action against the maker of a note payable at Were, Bruce, and Co.'s: the place of payment being a material part of the instrument, it was urged that defendant should have had notice of the note's dishonour; for the answer being "not sufficient effects," showed there were some effects there. Lord Ellenborough thought notice unnecessary, and verdict for plaintiff.

(169) *Roscoe v. Hardy*, 12 East's Rep. 434. Acceptance of a

bill was refused : of this, however, the holders gave no notice ; but when the bill became due, they again presented it for payment, and that being refused, they called upon the plaintiff, an indorser, for payment, and he, being ignorant of their laches, paid it. He now sued the defendant as his indorser, who set up the laches of the holders as a defence ; and the plaintiff was nonsuited. On motion to set aside this nonsuit, it was urged, that the plaintiff ought not to be prejudiced by the laches of subsequent holders, of which he was ignorant, without the means of information. But the Court held that his ignorance, which had prevented his availing himself of this laches as a defence, could not alter or revive the liability of the defendant, who had been discharged by the same laches.

C A P. VIII.

Payment — to whom.

If the Proprietor die, p. 314.

_____ *become Bankrupt, p. 314.*

_____ *be under Age, p. 315.*

_____ *Coverture, p. 315.*

Bankrupt, p. 315.

Customer, where the Bill or Note is in his Banker's Hands, p. 317.

In case of forged Bill, p. 318.

_____ *though with genuine Signature, p. 322.*

_____ *upon unwarranted Signature by Procuration, p. 323.*

Where a Banker's Name is written across, or there is any other Circumstance to guard against improper Payment, p. 324.

— *by whom,*

Bankrupt, p. 325.

_____, *Stranger. — For Honour, p. 325.*

— *when,*

Before Protest, p. 326.

Before due, p. 326.

PAYMENT should be made to the (1) proprietor of the bill or note, or to some person authorised by him to receive payment.

If the proprietor die, payment should be made to his personal representative ; if he become bank-

(1) Pothier, pl. 164.

rupt to his assignees; if he be an infant, to his guardian; and payment to the (2) infant himself may, under circumstances, be good; at least, if it be beneficial to him.

Where payment is made to an executor having probate, the payment will be a good discharge to the person making it, though the bill be really a forgery. (3)

In the case of a married woman, payment should be made to (4) her husband.

Payment to a bankrupt before the date and issuing of a commission against him, will be (5)

(2) See Pothier, pl. 166., and *antè*, p. 46.

(3) A *bonâ fide* payment of a debt to a person who has the probate of a will purporting to be the creditor's, will discharge the debtor, if the creditor be dead, though the will afterwards turn out to be a forgery, and the probate be annulled on that ground; because such payment is made on the authority of the probate: but it is otherwise (*per Ashhurst and Buller Js.*) if the creditor be living, because in such case the probate is a mere nullity. *Allen v. Dundas*, 3 Term Rep. 125.

(4) See *Connor v. Martin*, *antè*, p. 135. n. (32), and *Barlow v. Bishop*, *antè*, p. 47. n. (8).

(5) By 1 Jac. 1. c. 15. s. 14., it is provided, "That no debtor of the bankrupt be hereby endangered for the payment of his or her debt, truly and *bonâ fide*, to any such bankrupt, before such time as he shall understand or know that he is become a bankrupt."

And by 6 G. 4. c. 16. s. 82., "All payments really and *bonâ fide* made, or which shall hereafter be made, to any bankrupt before the date and issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy, by such bankrupt committed; and such

good, if made *bonâ fide*, and without notice of any act of bankruptcy: and payment by the drawee of a bill, drawn by a trader after a secret act of bankruptcy (6), and accepted by the drawee *bonâ fide*, and without notice of any act of bankruptcy, will perhaps be protected, though the bill do not become due until it is notorious that a commission against him has issued. The acceptance, which creates an

"creditor shall not be liable to refund the same to the assignee of such bankrupt, provided the person so dealing with the said bankrupt had not, at the time of such payment to such bankrupt, notice of any act of bankruptcy by such bankrupt committed."

And by 6 G. 4. c. 16. s. 83., "The issuing of a commission shall be deemed notice of a prior act of bankruptcy (if an act of bankruptcy had been actually committed before the issuing of the commission), if the adjudication of the person or persons against whom such commission has issued shall have been notified in the London Gazette, and the person or persons to be affected by such notice may reasonably be presumed to have seen the same."

(6) *Wilkins v. Cascy*, 7 Term Rep. 711. A factor was indebted to his principal in 222*l.* 18*s.*; the principal committed an act of bankruptcy, and drew on his factor for 222*l.* 18*s.*; the factor did not know of the act of bankruptcy, and accepted the bills: before they became due, a commission issued, notwithstanding which the factor paid them; the assignees sued the factor for the 222*l.* 18*s.*; and on a case reserved, insisted that though the statute (1 Jac. 1. c. 15.) would protect a *payment* before notice of the bankruptcy, it would not a mere acceptance. Sed per Lord Kenyon, the statute ought to receive a liberal construction; giving goods in exchange would have been a payment, though not in money; and so is giving an acceptance, if the bill be paid when due. The other Judges concurred, and the plaintiff had judgment.

obligation to pay, was within the protection of 1 Jac.1. as much as actual payment, and it is probably under the protection also of 6 G.4. c.16. s. 82.

And payment to a bankrupt, or accepting on his account, even after a commission issued, will be as much protected as a payment before, if the party paying or accepting knew nothing, and had not the means of knowing, of such commission. (7)

And payments *to* a bankrupt are entitled to a different consideration from payments *by* ; vacating the former makes the party pay twice, vacating the latter only puts one creditor on the same footing with the rest.

Payment to a customer, where a dishonoured bill or note is in the hands of his banker, will destroy all claim upon it by the banker, if the banker carry it to the customer's debit as soon as it is dis-

(7) *Sowerby v. Brooks*, 4 B. & A. 523. On 7th October a commission issued against Carbutt, but it was not gazetted till 5th November. 30th October Sowerby accepted a bill drawn on him by Carbutt for 95*l.* 4*s.*, a sum he owed Carbutt : he had no reason to suppose at that time that the commission had issued, or that Carbutt was a bankrupt or insolvent. Carbutt's assignees sued Sowerby for the old debt, and he relied on his acceptance, which he paid when due, as a discharge : the Court of Common Pleas thought it no discharge, on the ground that the issuing of the commission was notice to all the world of the bankruptcy ; but the facts being stated in a special verdict, the Court of King's Bench, on error, thought otherwise, and reversed the judgment.

honoured, and the subsequent payments by the customer cover and discharge such debit. (8)

Especially if the accounts between the customer and banker be continued for a long space of time, and the banker never notice such bill or note. (8)

And if the banker upon the bankruptcy of the customer prove his balance against him, and in the exception as to securities be silent as to this. (8)

Before a drawee pays a bill he has not accepted, and before a banker pays a bill accepted payable at his house, he should be satisfied that the signature importing to be the drawer's is genuine (9)

(8) *Field v. Carr*, 5 Bingham 13. Defendant was the acceptor of two bills due 22d February, 1823, payable to Crawshaw. Crawshaw indorsed them to plaintiffs, his bankers; and plaintiffs entered them to Crawshaw's credit; they were dishonoured, and plaintiffs then carried them to Crawshaw's debit. Defendant paid Crawshaw the amount in April, 1823, but the bills remained with plaintiffs. Crawshaw made payments to plaintiffs which reached far beyond the debit of these bills, and balances were struck between plaintiffs and Crawshaw at the end of 1823, 1824, and 1825, and these bills were not noticed. April, 1826, Crawshaw became bankrupt, and plaintiffs proved under his commission; and, in the exception as to securities, stated that they had no security save and except certain other bills, not these. In 1827, plaintiffs called upon defendant to pay these acceptances, and brought this action: defendant was surprised at the trial, and plaintiffs had a verdict: but upon affidavits disclosing the state of accounts between plaintiffs and Crawshaw, and some other matters on which the surprise consisted, the Court held, that if the payments by Crawshaw would extend to wipe out the item of debit upon these bills, which they clearly did, these bills were to be considered as paid, and a new trial was accordingly granted.

(9) *Price v. Neale*, Burr. 1354. Blackst. 390. Two forged

If it be not, he will not be entitled to recover back the money. (9)

At least he will not, unless he discover the forgery, and give notice thereof the same day. (9)

A discovery and notice the following day will be too late. (9)

bills were drawn upon the plaintiff, which he accepted and paid : on discovering the forgery he brought this action for money had and received to recover back the money ; but on a case reserved, the Court held it would not lie ; and Lord Mansfield said, " It was incumbent on him to have been satisfied, before he accepted or paid them, that the bills were the drawer's hand ;" and in *Smith v. Chester*, 1 Term Rep. 655., Buller J. says, " When a bill is presented for acceptance, the acceptor looks to the hand-writing of the drawer, which he is afterwards precluded from disputing, and it is on that account that he is liable, even though the bill is forged."

Smith v. Mercer, 6 Taunt. 76. A bill was drawn on Evans, payable to Temple, indorsed by him to Le Souef, and by Le Souef to defendants : defendants indorsed it, that their correspondents in town might get it paid : it had upon it, when defendants took it, this acceptance, " Smith, Payne and Smiths, Maurice Evans." This was a forgery ; but defendants did not know it : when the bill became due, Smith, Payne and Smiths paid it, but at the end of a week they discovered the forgery, and gave notice thereof to defendants, and on their refusal to refund the money, brought an action for money had and received. On a special case, Chambre J. thought plaintiffs entitled to recover, because defendants, by indorsing the bill with the forged acceptance thereon, had impliedly vouched for its authenticity, and because there was no blame or negligence imputable to plaintiffs, and it was against conscience in defendants to keep their money, for which they got nothing ; but the other Judges thought plaintiffs not entitled : Dallas and Heath Js., because it was plaintiffs' duty to know their customer's hand before they paid the bill ; and Gibbs C. J., because plaintiffs'

Nor can he charge the supposed drawer or acceptor with the amount.

And a man who pays for honour, must be satisfied that the name of the person for whose honour he pays is genuine: otherwise, he will not be entitled to charge the amount against his principal; nor can he recover back the money unless he discover his mistake and give notice thereof the same day. (10)

conduct had prevented notice to those parties defendants might have sued, and had therefore destroyed the remedy against them. *Postea* to defendants.

Cocks v. Masterman, B. R. sittings after Trin. 1829. A bill importing to be drawn upon Sewell and Cross, due 24th May, had upon it a forged acceptance in the name of Sewell and Cross, making it payable at Cox and Biddulph's, bankers, London: defendants, who were also London bankers, received it from a customer, Saunderson and Co., and presented it for payment on the 24th. Plaintiffs, believing the acceptance to be genuine, paid the bill; but the next day they discovered the forgery, and about one o'clock on that day they gave notice thereof to defendants, to Saunderson and Co., and to the indorsers. Defendants having refused to return the money, plaintiffs sued them: the jury found a special verdict, and upon argument it was insisted, that as the mistake was discovered by plaintiffs in time for giving the proper notices, to prevent any of the parties to the bill from being discharged, they had a right to recover back the money: but, on time to consider, the Court considered it clear that the holder of a bill was entitled to know on the day it became due whether the bill was to be considered as honoured or not, and that if he were suffered throughout that day to suppose it was honoured, it was too late the next day to tell him it was not. Judgment for defendant.

(10) *Wilkinson v. Johnston*, 3 B. & C. 428. Three bills, with an indorsement in the name of A. Heywood, Sons and Co.,

And before any change of circumstances. (10)

But if he make the discovery, and give notice thereof the same day, and before any change of circumstances, he may recover back the money. (10)

Especially if the person, to whom he made the payment, brought him the bill upon the supposition that the signature was genuine. (10)

And it will be no bar to his claim for restoration of the money, that he had struck out the names of several indorsers. (10)

But, he may be liable for whatever damages that striking out occasions. (10)

being dishonoured, the notary carried them to plaintiffs, the London bankers of A. Heywood Sons and Co., that they might take them up for the honour of A. Heywood Sons and Co., which they did immediately, at about 11 a. m. Plaintiffs cancelled the names of every indorser subsequent to the name of A. Heywood Sons and Co., by running the pen through them, as soon as they paid the bills. But plaintiffs very soon discovered that the indorsements were forged, and before one a. m. they gave notice to Smith and Co., defendants' agents, by whom the notary had been employed, and who had received the money, and demanded the money back, and on non-payment sued defendants. Case and two arguments, and after time to consider, the Court held plaintiffs entitled to recover: they were not alone to blame; part of the fault was in defendant's notary, who brought the bills to them as genuine, and thereby led them into the mistake; they corrected the mistake in time to prevent any party to the bills being discharged by want of notice, and before the situation of any of the parties could have been altered; the cancelling the indorsements, being by mistake, did not vacate them, the indorsers might still be sued, and if such cancellation caused damage or additional expense to any one, it might make

And whoever pays a bill should be satisfied it is, in all its parts, genuine : if it be not, he will pay it at his peril, and will lose his remedy against the party on whose account he pays it. (11)

Thus, if a banker pay a cheque which has the genuine signature of his customer, he will not be entitled to charge it against his customer, if the amount has been altered by forgery since the customer issued it. (11)

And it will give the banker no claim, though the customer drew it for a sum below what drafts on bankers are usually drawn for, and lent it to a friend. (11)

But if a bill be drawn in a careless and informal mode, and that mode facilitates, and perhaps suggests, the commission of the forgery, the customer, and not the banker, shall bear the loss. (12)

plaintiffs liable to bear that damage ; but that damage would not necessarily extend to the whole amount of the bills, and therefore was no defence to the action. *Postea* to plaintiffs.

(11) *Hall v. Fuller*, 5 Barn. & Cr. 750. Plaintiff lent Wagstaffe a cheque on plaintiff's bankers, defendants, for 3*l.* : W. altered the 3*l.* into 200*l.* ; and defendants paid it : they insisted on charging plaintiff with the 200*l.* ; and, on case, it was urged that plaintiff should not have drawn on his banker for so small a sum as 3*l.*, and that the forgery was such that common observation would not have detected it : this was true ; but the Court said, it did not appear defendants had ever prohibited plaintiff from drawing for so low a sum, and hard as the case might be, defendants had authority to charge against plaintiff such sums only as plaintiff had ordered him to pay, and here plaintiff had only ordered him to pay 3*l.* *Postea* to plaintiff.

(12) *Young v. Grote*, 4 Bingh. 253. Young left a blank

As, if in the first word for the amount a small letter be used instead of a capital one, and space be left for prefixing a previous word; and where the amount is specified in figures, space be left where a previous figure may be introduced, and the bill be left in the possession of the person by whom the words and figures to denote the sum were written, and by whom the forgery was afterwards committed.

When any of the signatures, through which the right to payment is conveyed, import to be by procuration, the person paying should satisfy himself

cheque with his wife, duly signed by him, that she might fill in sum and date according to what she might want: she wanted 50*l.* 2*s.* 3*d.* for wages, and by her orders Worcester, one of Young's clerks, filled it up accordingly, and showed it her, and she directed him to get it cashed by defendants, her husband's bankers: in filling up the cheque Worcester wrote the word fifty with a small initial, and left sufficient space on the left side for introducing any additional word, and he wrote the figures so as to leave space on the left side for any additional figure, and before presenting it Worcester put "three hundred and" before the word "fifty," and a 3 before the 5, so as to make it a cheque for 350*l.* 2*s.* 3*d.* Defendants paid it as such. Plaintiff would not allow that payment, and sued for his balance. The cause was referred: and the arbitrator found that there was gross negligence in suffering Worcester to have possession of the draft, drawn as that draft was, in his handwriting, and with such spaces not filled up so as to exclude all chance of detecting the forgery; and that as plaintiff, or those with whom he was identified, by such negligence, were the cause of defendants paying the cheque according to its altered state, plaintiff ought to bear the loss: rule nisi that the award should be corrected, and defendants pay the money drawn.

the procuration was such as to warrant the signature. Otherwise it may be at his peril if he make the payment. (13)

And he should see that none of the indorsements are restrictive. (14)

If the drawer of a cheque write across it the name of the banker of the party to whom he pays it, it may be at the peril of the person paying it if he pay it to any person but that banker. (15)

(13) See *East India Company v. Tritton*, antè, p. 73.

(14) See *Ancher v. Bank of England*, antè, p. 125. n. (16), *Sigourney v. Lloyd*, antè, p. 125. n. (15).

(15) *Stewart, assignee of Payne, v. Lee and others*, 1 Moody & M. 158. *Crossthwaite and Stewart* were assignees of *Payne*. *Farebrother* gave *Crossthwaite*, as one of such assignees, a cheque for 792l. 6s. 4d., payable to "Messrs. *Crossthwaite* and " *Stewart*, assignees of *Payne*, or bearer," and *Lee and Co.* being bankers to the assignees, *Farebrother* wrote their name across the cheque: the cheque was paid to *Lec and Co.*; but *Crossthwaite*, having another account with *Lee and Co.*, as surviving partner of *Wilkinson*, he directed *Lee and Co.* to carry the money to that account, which they did. This action was, therefore, brought, and Lord Tenterden told the jury that any person who knowingly assisted another in applying money to a different purpose from that to which he was bound to apply it, could not say that was a proper application of the money; and that if the precaution of writing " *Lee and Co.*" across the cheque were sufficient information to *Lee and Co.* to what account the money was to be applied, they would be answerable for not so applying it; but, that as that was a question of mercantile usage, it was a question for their consideration, and he, therefore, left it to them, Whether they ought to have known, from the form of the cheque, and the banker's name across it, that it was properly applicable to the account of the assignees. The jury thought it was not, and found for defendants.

And if the party to whom the drawer pays it have two accounts at his banker's, one in his own, and the other in a representative, character, and the cheque, though made to him or bearer, speak of him as in his representative character, it will be for a jury to say whether such banker, if he receive the money, can carry it to his customer's separate account. (15)

Payment *by* a bankrupt, really and *bonâ fide* made in respect of a (16) bill or note before the date and issuing of a commission against him, will be valid ; provided the party paid were ignorant of any act of bankruptcy having been committed by such bankrupt.

After a foreign bill has been protested for non-payment, any person may pay it (under protest) for the (17) honour of the drawer or of an indorser ; and he is entitled to demand repayment, not only from the person for whose honour he made the payment, but from (18) all other parties who are liable to that person.

(16) By 6 G. 4. c. 16. s. 82. " All payments really and *bonâ fide* made, or which hereafter shall be made by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt, such payment not being a fraudulent preference of such creditor, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed : provided the said person so dealing with the said bankrupt had not, at the time of such payment by such bankrupt, notice of any act of bankruptcy by such bankrupt committed."

And see 6 G. 4. c. 16. s. 83. *antè*, note (5).

(17) Beawes, 2d ed. pl. 50. and *vide antè*, p. 178, 179, 180.

(18) Beawes, 2d ed. pl. 57., *vide antè*, p. 179, 180. and Mertens

But a person must not pay a foreign bill for honour unless it is protested. (19)

If he do, he will pay at his peril; he will have no remedy against the party for whose honour he pays it: for, it is part of the custom of merchants that the bill should be protested before such payment. (19)

Payment of a bill or note should not be made (20) *before* it has become due;

If it be, it is at the peril of the person paying.

A cheque upon a banker was lost, and paid to a stranger the day before it *bore date*; the banker was obliged to repay the money to the loser. (21)

v. *Winnington*, post, p. 328. n. (2); *Hall v. Pitfield*, post, p. 329. n. (3), and ex parte *Lambert*, post, p. 329. n. (4).

(19) *Vandewall v. Tyrrell*, 1 *Moody & Malkin*, 87. Defendant drew four bills at Jamaica, at nine months' sight; they were accepted, and became due 30th July, 1825; they were then dishonoured, and noted, and on 8th August plaintiff, at the instance of the acceptor, took them up for the honour of defendant: the bills were not protested till May, 1826, and the protest then made imported to have been made before plaintiff paid, and stated that plaintiffs were ready to pay. Lord Tenterden said, it was part of the custom that there should be a formal protest before payment could be made for the honour of any party to the bill; and he nonsuited plaintiff.

(20) *Marius*, 4th ed. p. 31., who observes, that if the drawee pay a bill before it has become due, and it appear that the payee was merely the factor or agent of the person who delivered it to him, and that person countermand the payment before the maturity of the bill, but after such payment by the drawee, the latter may be obliged to repay the money.

(21) See *Da Silva v. Fuller*, *Chitty*, 148.

C A P. IX.

Remedy on Bills or Notes.

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UPON a non-acceptance or nonpayment, the holder of a bill or note may sue all the persons liable to him on account of such non-acceptance or nonpayment; and he may sue them either at the same time or successively.

An indorser, an acceptor for the honour of an indorser or drawer, or the (1) drawer, is, after

(1) *Louviere v. Laubrey*, 10 Mod. 36. The plaintiff drew a bill upon the defendant, payable to order, which the defendant accepted, but afterwards refused to pay; upon this the bill was

payment by him, holder; but he holds in his original capacity, not as upon a transfer from the person he has paid.

So, the bail of any of the parties who are sued, or (2) any persons who pay the bill or note on account of any of the parties, become, on payment, holders; and they hold as upon a transfer from the

indorsed to the plaintiff, and the question was, Whether he could maintain an action as indorsee; and, per Parker C. J., "upon evidence that he had effects in the hands of the defendant enough to answer the bill, and consequently that the acceptance was not upon the honour of the plaintiff, the action is well brought, but if there were no effects the action would not lie;" and the plaintiff recovered.

Symonds v. Parminter, 1 Wils. 185. 4 Bro. Parl. Cas. 604. The plaintiff drew a bill upon the defendant to the order of Cleer and Co., which the defendant accepted, but did not pay; the plaintiff paid it, and brought this action. The declaration stated that the plaintiff drew the bill; that the defendant accepted it, but did not pay it; that the plaintiff became liable, and paid it; by reason whereof, the defendant became liable and promised. The defendant demurred, and afterwards moved in arrest of judgment, and contended that the action would not lie; but the Court, after two arguments upon the demurrer, and one on the motion in arrest of judgment, were of opinion that it would, and judgment was given for the plaintiff. The defendant brought a writ of error in parliament, but did not appear at the bar to support it, and the judgment was affirmed.

(2) *Mertens v. Winnington*, 'Espinasse, 112. A bill was drawn by the defendant, and indorsed by Burton Forbes and Gregory; the plaintiff paid it for the honour of Burton Forbes and Gregory, and brought this action against the defendant as drawer; the defendant contended that a person who paid for the honour of one of the parties could only sue that party; but Lord Kenyon said, "he was to be considered as an indorsee

person for whom they made the payment, not (3) as upon a transfer from the person they have paid.

And they stand, with respect to other parties to the bill or note, in the situation of the party for whom they made the payment ; and, consequently, unless he could have sued upon the bill or note, they (4) (5) cannot.

If a bill or note be indorsed by A. to B., and back again by B. to A., A. cannot sue B. upon the bill or note ; because, A. would be liable over to B. upon his first indorsement. (5)

“ paying full value for the bill,” and he directed the jury to find for the plaintiff.

(3) *Hall v. Pitfield*, B. R. Hil. 17 Geo. 2. The indorsee of a note sued the maker, and on payment by his bail permitted them to sue the indorser in his (the indorsee's) name, but the Court held that the payment by the bail discharged the indorser, and that the action could not be maintained.

(4) *Bishop v. Hayward*, 4 Term Rep. 470. The plaintiff declared upon a note payable to himself or order, indorsed by him to the defendant, and by the defendant indorsed back again to him, and obtained a verdict ; a rule was granted to show cause why the judgment should not be arrested, on the ground that according to the statement in the declaration, the plaintiff would be liable, upon his indorsement, to pay the defendant the sum for which the verdict was given ; and upon cause shown, the Court held the objection good ; because, as the plaintiff had not stated it to be otherwise, his indorsement was to be considered as a legal existing indorsement : had any circumstances existed which exempted the plaintiff from answering upon his indorsement to the defendant, they should have been disclosed on the record. And see *Louviere v. Laubrey*, *antè* p. 327. *noté* (1).

(5) *Ex parte Lambert*, 13 Ves. 179. *Adams and Co.* drew

At least, A. must not sue upon the bill or note without showing specially that his indorsement to B. raised no obligation from him to B. (4)

And if he allege that by his indorsement he appointed the contents to be paid to B., he cannot afterwards allege any thing which imports that the contents were not to be paid to B. (6)

An allegation that at the time of drawing and

two bills on Lane and Co., which the latter accepted. Lambert took up both these bills for the honour of the drawers. A commission of bankruptcy afterwards issued against the acceptors, and the drawers also failed: Lambert received a dividend upon the bills from the estate of the drawers, and claimed the balance from the estate of the acceptors; but, it being proved that the drawers had no effects in the hands of the acceptors, and that the acceptances were for the accommodation of the drawers, the claim was rejected; and upon petition, the Lord Chancellor said that Lambert could not make a title stronger than that of the drawers, nor oust the assignees of the defence which they would have had against them. Petition dismissed.

(6) *Britten v. Webb*, Hil. 1824. 2 Barn. & Cr. 483. Plaintiffs stated that they drew their bill upon Webb payable to their own order; that Webb accepted; that plaintiffs by their certain indorsement appointed the contents to be paid to defendant; and that defendant afterwards by his indorsement appointed the contents to be paid to plaintiffs; and plaintiffs averred that at the time of the drawing of the bill, and of defendant's indorsement, it was agreed between plaintiffs and defendant, that defendant's name should be upon the bill as a security to plaintiffs for the due payment to plaintiffs of the sum in the bill by Webb, being a debt due from Webb to plaintiffs; that the bill was indorsed by defendant under that agreement and for that purpose only; that plaintiffs took it in satisfaction of the debt from Webb upon the faith that defendant would so indorse it; and

indorsing the bill, it was agreed between A. and B. that B.'s name should be indorsed on the bill or note, as a security to A. for a debt due from the acceptor or maker to A., and that A.'s indorsement to B. was without consideration, and only made that B. might reindorse to A., will not be sufficient to enable A. to sue: for, it gives A. no claim under the custom of merchants, shows no consideration for B.'s indorsement, and would let in parol evidence to prove a contract to pay for another's debt. (6)

An action (7) may be brought for non-acceptance

that the indorsement by plaintiffs to defendant was without consideration from defendant to plaintiffs, and for the purpose only of procuring defendant's indorsement, and making the bill negotiable. On demurrer, the Court held, these averments did not entitle plaintiff to sue; they were at variance with the allegation, that plaintiffs appointed the sum of money, mentioned in the bill, to be paid to defendant, and gave plaintiffs no right to sue upon the usage and custom of merchants; and to give plaintiffs a right to sue exclusively of such usage, they were bound to state a consideration for defendant's promise, which they had not done.

(7) *Bright v. Purrier*, Bull. Nisi Prius, 269. A foreign bill, payable 120 days after sight, was presented for acceptance, but acceptance being refused, the holder brought an action immediately against the drawer; the defendant objected that he was not liable till the expiration of the 120 days, and offered to call witnesses to prove that such was the custom of merchants; but Lord Mansfield said the law was clearly otherwise, and refused to hear the evidence; so the plaintiff recovered.

Milford v. Mayor, Dougl. 55. The defendant drew a bill of exchange, which the drawee refused to accept, upon which the

before the expiration of the time limited by a bill for its payment.

And such action may be brought against an (8) indorser, as well as against the drawer.

All the antecedent parties are liable to the holder on account of a non-acceptance or nonpayment; and if the bill or note were transferred to him, for a precedent consideration, by delivery, the person who delivered it is still liable to be sued for such consideration.

If the holder sue all the persons liable at the same

plaintiff arrested him before the bill became due; these facts appearing upon the affidavit to hold to bail, a rule was obtained to show cause why the defendant should not be discharged; but upon showing cause, Buller J. said, "it is settled that if a bill is not accepted, an action will lie immediately against the drawer, because his undertaking that the drawee shall give him credit is not performed; there have been actions of this sort;" and Willes and Ashhurst Js. concurring, the rule was discharged.

(8) *Ballingalls v. Gloster*, 3 East Rep. 481. John Gloster drew a bill on Jackson, payable to Anthony Gloster's order, and the latter indorsed it to the plaintiffs. Jackson refused acceptance, on which the plaintiffs immediately sued Anthony Gloster, without waiting until the bill, which was drawn at 90 days' sight, would have been due. The plaintiffs had a verdict, with liberty to the defendant to move for a nonsuit. On rule nisi accordingly, it was urged that an indorser stood in a situation different from that of a drawer; and that although a drawer might be sued immediately on non-acceptance, an indorser could not until the expiration of the time limited for the payment of the bill; but the Court was clear that the case of an indorser was not distinguishable from that of a drawer, and that every indorser was a new drawer. Rule discharged.

time, it was at one time (9) supposed that the Court or a Judge would not stay proceedings in any one action but upon payment of the money recoverable in that, and the costs in such of the rest in which judgment had not been obtained; but it is now settled that in the (10) case of a regular bill, where the acceptor is the proper person to provide for payment, he is the only person against whom the plaintiff is entitled to the costs of *all* the actions; and that each of the other parties is entitled to a stay of proceedings upon paying the debt and the costs in the action against him.

The maker of a note stands in this respect in the condition of the acceptor of a bill.

(9) *Golding v. Grace*, Blackst. 749. The indorser of a bill obtained a rule nisi to stay proceedings on payment of the debt and the costs of the writ; the plaintiff insisted that he was entitled to be paid for drawing declarations against the defendant and the drawer; and it was agreed that if any were to be paid for, the plaintiff was entitled to be paid for both; but the Court held that the application to pay debt and costs was made so early, that the plaintiff was only entitled to the costs of the writ.

(10) *Smith v. Woodcock*, *Same v. Dudley*, 4 Term Rep. 691: The holder of a bill brought actions against the acceptor, the drawer, and two indorsers; the drawer and one of the indorsers obtained a rule nisi to stay proceedings against them on payment of the bill and costs of the actions against *them*; the plaintiff insisted that the costs of the other actions should be also paid: sed per cur. "that is only necessary where the application comes from the acceptor, who is the original defaulter, and against whom all the costs occasioned by his default may be recovered." Rule absolute.

And where it appears that some of the actions are friendly and collusive, not to obtain payment, but to increase costs, it is probable the costs of those actions would not be included.

Though the owner may recover judgments in all the actions, he (11) can only once recover the sum payable by the bill or note, and the costs; and if he reject a tender of such sum and costs, the (12) Court will make an order to restrain him from taking out execution.

If the holder at first sue some only of the persons liable, he may at any time before satisfaction sue all or any of the rest.

And the difference between extinguishment and satisfaction is to be remembered; the holder's claim upon a bill or note may be extinguished as to some parties, and remain entire as to others; if his claim be satisfied as to any, it is satisfied as to all.

Taking security of a higher description, as, a bond or judgment, for the money due upon a bill or note,

(11) *Ex parte Wildman*, 2 Ves. 115. per Lord Hardwicke, "In cases of bills of exchange or promissory notes, where there is a drawer and indorser, perhaps more than one judgment is against all, but there can be but one satisfaction."

(12) *Windham v. Withers*, Stra. 515. The plaintiff having obtained judgments against the drawer and indorser of a note, the principal in one, and the costs in both, were offered him, which he refused; and the Court granted a rule to restrain him from taking out execution, and intimated that they would have punished him, had he taken out execution upon both judgments.

extinguishes the holder's claim upon the bill or note, against the party giving that security (13): it does not satisfy it.

So, obtaining judgment on a bill or note is an extinguishment as between the parties, not a satisfaction.

But taking a warrant of attorney to enter up judgment, is not, unless judgment be actually entered up, even an extinguishment. (14)

Obtaining (15) a judgment is no satisfaction, even as to the parties subsequent to him against whom the judgment is obtained.

And (16) the actual taking of a man in execution, and discharging him upon a letter of licence, is no satisfaction as to any of the antecedent parties.

(13) Bac. Abr. tit. Extinguishment, (D), vol. iii. p. 106.

(14) *Norris v. Aylett*, 2 Campb. 329.

(15) *Claxton v. Swift*, 2 Show. 441. 494. Lutw. 882. To an action against the indorser of a bill, the defendant pleaded that the plaintiff had recovered a judgment against the drawer, and that the judgment was still in force; and upon demurrer, the Court of King's Bench held the plea good, but the Court of Exchequer Chamber held otherwise, and the judgment was reversed.

(16) *Hayling v. Mulhall*, Blackst. 1235. A bill was indorsed by Sheridan to Boon, and by him to the plaintiff: he sued Boon, and took him in execution, but discharged him upon a letter of licence; he then sued Sheridan, for whom the defendant became bail; and upon an action against the defendant, *he* contended that the debt was satisfied by the imprisonment of Boon: but the Court was clear it was not, and Mulhall was obliged to pay the money.

Nor (17) is it a satisfaction, that the defendant has been charged in execution on the bill or note, and discharged as an insolvent, unless as to the party at whose suit he was so charged : it is no bar to a claim against him upon the bill or note by a party from whom the former plaintiff recovered the amount.

If a bill or note be mislaid, and an agent for one of the parties tender payment, on condition that the bill or note is delivered up, such tender is no satisfaction of the demand ; and if the agent fail with the money in his hands before the bill or note is found, it will be no answer to an action upon the bill or note against the principal. (18)

(17) *M'Donald v. Bovington*, 4 Term Rep. 825. A bill drawn by M'Donald on Bovington, was indorsed to Thompson, who charged Bovington in execution upon it ; Bovington was discharged as an insolvent, and then Thompson sued M'Donald and recovered. M'Donald paid the bill, sued Bovington, and charged him in execution ; and on a rule nisi to discharge him, and cause shown, it was urged that Bovington had satisfied the bill by being charged in execution at the suit of Thompson. Sed per Lord Kenyon, "nothing can be clearer than that he has not ; it was a mere formal satisfaction as to Thompson, not like actual payment ; and when M'Donald was obliged to pay the bill a new cause of action arose against the defendant by the payment, without regard to what passed in the former action ;" and per Buller J., "the consequence would be, that because the drawer was obliged to pay the holder, the acceptor would be discharged without paying either." Rule discharged.

(18) *Dent v. Dunn*, 3 Campb. 296. An executor deposited money with an agent to pay notes of the testator : plaintiff had some of the notes, but could not find them : the agent tendered

But payment of interest shall cease from the time of such tender. (18)

If the holder of a bill or note send it to the person who ought to pay it, not for immediate payment in money, but that he may give the holder credit in account, and order the payment at a distant place by that night's post; the bill or note is, as to the other parties, to be considered as honoured as soon as the person to whom it is sent gives the holder credit for it. (19)

him the money if he would give up the notes, but they could not be found, and the agent failed with the money in his hands: plaintiff afterwards found the notes, and brought this action. It was urged for defendant, that plaintiff ought to bear the loss; for, had he not mislaid the notes, they would have been paid. *Sed per Lord Ellenborough*, "here was only a tender, which "could not extinguish the debt; plaintiff did nothing to make "the stakeholder his agent; he continued defendant's agent:" verdict for plaintiff, but interest to the time of the tender only.

(19) *Gillard v. Wise*, 5 Barn. and Cr. 134. 18th March plaintiff deposited with defendants in the Totness bank 800*l.* at interest; 657*l.* was in notes of the Dartmouth bank: by the course of dealing between these two banks, the Totness bank sent the Dartmouth bank every morning all the Dartmouth notes they had received the preceding day, and the Dartmouth bank immediately entered them to the credit of the Totness bank, and reissued them: every evening the Dartmouth bank did the same with the Totness notes they received, and an order was given every evening upon London for whatever was the balance of either house. On the morning of the 19th, defendants sent the 657*l.* to the Dartmouth bank; they entered the amount to defendants' credit, and reissued the notes, but, towards the close of the day, they stopped payment, and they sent over that evening no Totness notes to defendants, nor any order upon London: defendants, therefore, insisted against plaintiff that,

And it will make no difference though such person fail the same day and do not order the payment by that night's post. (19)

(20) Discharging, or (21) giving time to any

as between them, they were entitled to consider the 657*l.* notes as dishonoured, and were not liable to pay plaintiff the amount : but on case and argument, the three judges of B. R. were of opinion, that as between plaintiff and defendants these notes were to be considered as honoured ; they were to be considered as presented for payment when the Dartmouth bank received them ; and if defendants, by their course of dealing, instead of requiring payment were content to have credit only and defer payment, it was at their peril : had they employed a third person as their agent, actual payment would have been made ; and if, for a like accommodation to themselves from the Dartmouth bank, they thought fit to make the Dartmouth bank their agents, that was an arrangement between the banks, which did not affect plaintiff. He was entitled to recover, as if the defendants had received from the Dartmouth bank the full amount of the Dartmouth notes. Judgment for plaintiff.

(20) *Ex parte Smith*, 3 Bro. C. C. 1. Lewis and Potter indorsed certain bills and notes to Esdaile, and became bankrupt. Esdaile proved the amount of the bills and notes under their commission, and afterwards received a composition from the acceptors of the bills, and the makers of the notes, and gave them a full discharge, without the knowledge of the assignees of Lewis and Potter. On petition by the assignees to have the debt in respect of the bills and notes expunged, the Chancellor held that, by discharging the acceptors and makers, without the consent of the indorser, the latter was discharged also. To the same effect is the case of *Ex parte Wilson*, 11 Ves. 410. See also *Smith v. Knox*, 3 Esp. N. P. C. 46.

(21) *English v. Darley*, 2 Bos. and Pull. 61. The holder of a bill sued the indorser and acceptor, and took out execution against the acceptor, but received 100*l.* from him, and took his bond and warrant of attorney for payment of the remainder by instalments, with interest and costs, except only a nominal sum to enable him to support actions against the other parties :

of the parties, is a discharge of every other party, who, upon paying the bill or note, would be entitled to sue the party to whom such discharge or time has been given;

he then brought on to trial this action against the indorser. Lord Eldon thought that the bargain to give indulgence to the acceptor was a bar, and nonsuited the plaintiff; and, on motion for a new trial, the Court was clear that the nonsuit was right; because giving time to the acceptor was a pledge that he should have time from all the other parties, and the holder had no right to give such pledge and yet hold the other parties liable.

Gould v. Robson, 8 East's Rep. 576. The holder of a bill, upon its becoming due, received part payment from the acceptor, and took a bill from him at a future short date for the remainder, and agreed to keep the original bill in his hands in the interim, as a security. He now sued the defendants as indorsers, and this was relied upon as a defence. Lord Ellenborough thought at the trial, that it did not amount to a giving time to the acceptor, and the plaintiff had a verdict; but upon motion for a new trial, he and the Court were satisfied that it did, and a nonsuit was entered.

Laxton v. Peat, 2 Campb. N. P. C. 185. Indorsee of a bill against the acceptor. It appeared that the bill had been accepted for the accommodation of the drawer, which circumstance was known to the plaintiff, who gave value for the bill. When the bill became due, the plaintiff received part payment from the drawer and gave him time to pay the remainder, without the concurrence of the defendant. Lord Ellenborough held, that this being an accommodation bill, within the knowledge of all the parties, the acceptor could only be considered as a surety for the drawer; and in the case of simple contracts, the surety is discharged by time being given, without his concurrence, to the principal. Nonsuit. But see as to this case *antè*, p. 213. note (89).

See *Rees v. Berrington*, 2 Ves. jun. 540. Rees became surety in a joint and several bond conditioned for the payment to the obligee, of a certain sum with interest, by two instalments;

Unless the right to sue in such case result from facts out of the ordinary course ; as, from the signatures being accommodation signatures.

And if the party who would be entitled to sue assent (22) to the giving time, or if, knowing of its having been given, he (23) promise to pay the

the first on the 31st of December, 1789, and the second on the 31st of December, 1790. In September, 1790, the whole sum being unpaid, the obligee took promissory notes from the principal obligor, for payment of the debt by instalments at extended periods, which notes were afterwards exchanged for others payable at more distant days. This arrangement was without the knowledge of Rees. The principal obligor afterwards became bankrupt ; and the executor of the obligee sued Rees, the surety. And on a bill filed for an injunction, the Chancellor held, that the surety was discharged by this indulgence having been given without his consent to the principal. See also 2 Bos. and Pull. 62.

(22) *Clarke v. Devlin*, 3 Bos. and Pull. 363. Atkinson, the acceptor of a bill, having been arrested by the holder, offered him a warrant of attorney for the amount of the bill, payable by instalments : this offer the holder mentioned to the defendant, the drawer, proposing to accept of it ; who said, " you may do as you like, for I have had no notice of the nonpayment." In fact he had had notice. The Court held that this amounted to an assent on the part of the defendant to the security being taken, and therefore that the defendant was not discharged by this indulgence to the acceptor.

(23) *Stevens v. Lynch*, 12 East's Rep. 38. The defence in this action, which was by an indorsee against the drawer of a bill, was, that the plaintiff had given time to the acceptor ; in answer to which, it was proved that the defendant knew of such time having been given, but that, conceiving himself to be still liable, three months after the bill became due, he said to the plaintiff, " I know I am liable, and if Jones (the acceptor) does not pay it, I will." Upon this Lord Ellenborough directed a verdict

bill or note, his liability will be continued in the former case, and revived in the latter; and it will make no difference in the latter case, though the promise were made under a misconception of the law, the party believing himself to be still liable; unless the holder were instrumental in raising that belief.

If the holder of a bill *bind* himself to give time to the acceptor, he discharges all those parties who, if they paid the bill, would have remedy over against the acceptor. (24)

But to discharge those parties, the holder must be *bound* to give the time. (24)

to be found for the plaintiff; and upon a motion for a new trial, the Court held the direction right, and refused a rule.

(24) *Philpot v. Briant*, 4 Bingh. 717. In an action against the drawer of a bill, the defence was, indulgence to the acceptor's executrix. Plaintiff applied to the agent of the executrix, who said there was not sufficient property then, but if plaintiff would let the matter stand over, the executrix would engage to pay the bill out of her private income. Plaintiff promised, if the interest were paid, to give a reasonable time, and in pursuance thereof interest was paid out of the private income of the executrix: on rule nisi for nonsuit, cause shown, and time to consider, the Court held that a contract *binding* the holder to give time would discharge the drawer; but that to have that effect, the contract must be such as to *bind* the holder to give time: that a promise without adequate consideration did not bind the holder, but left him at full liberty to sue if he thought fit: that as a promise for payment out of the executrix's private income this was void, as not being in writing, and as a promise to pay out of the assets, it was only promising to do what without a promise she was bound to do.

And a promise without consideration will not bind him (24);

Nor will a promise void by the Statute of Frauds (24);

Or a promise, if part be paid, to give time for the residue. (24)

A release to the payee of a note does not discharge the maker (25);

Though the note were an accommodation note (25);

Unless that fact were known to the releaser when he gave the release. (25)

Agreeing, after a bill has become due and been regularly protested for nonpayment and notice thereof given, not to press the acceptor, will (26) not discharge the drawer.

(25) *Carstairs v. Rolleston*, 5 Taunt. 551. Assignees of first indorsee of note against the maker. Plea, that defendant made the note as surety for the payee, and not on his own account, and that plaintiff had released the payee from the note and from all claims and sums of money due thereon: there was no allegation that plaintiff knew that defendant was only surety, and on demurrer the plea was held bad, and plaintiff had judgment.

(26) *Walwyn v. St. Quintin*, 1 Bos. and Pull. 652. In an action by indorsees against the drawer of a bill, it appeared that after the bill had become due and been protested for nonpayment, though no notice thereof had been given to the defendant, he having no effects in the hands of the acceptor, the plaintiffs received part of the money *on account*, from the indorser; and that to an application from the acceptor, stating that it was probable he should be able to pay at a future period, they returned for answer that they would not press him. It was urged that either of these facts discharged the drawer: but the Court after argu-

Nor will (26) receiving part of the money on account from an indorser.

Giving time to the payee will not discharge the drawer ; for, indulgence to the payee cannot affect the drawer ; he may nevertheless pay and enforce his remedies. (27)

Giving time to the acceptor will not discharge the drawer, if the acceptance were to accommodate the drawer, and the drawer, as between him and the acceptor, be the person to pay the bill. (28)

ment, and time taken to consider, held that they did not, and awarded the *postea* to the plaintiff. Eyre C. J. said, that, had this forbearance to sue the acceptor taken place before noting and protesting for nonpayment, so that the bill had not been demanded when due, it was clear that the drawer would have been discharged ; it would have been giving a new credit to the acceptor. But that after protest for nonpayment, and notice to the drawer, or what was equivalent to notice, a right to sue the drawer had attached, and the holder was not bound to sue the acceptor : he might therefore forbear to sue him.

(27) *Claridge v. Dalton*, 4 M. & S. 226. Indorsee against drawer. Defence, that plaintiff's agent had given time to the payee : it did not appear that plaintiff had authorised him so to do : but on a rule nisi for nonsuit, and cause shown, the Court expressed a clear opinion, that if he had it would not affect the drawer or give him any ground of defence, and rule discharged.

(28) *Collott v. Haigh*, 3 Campb. 281. In an action against the drawer of a bill, it appeared that plaintiffs had given time for some weeks to the acceptor, but it appearing also that the acceptance was an accommodation acceptance, without value, Lord Ellenborough was clear that the drawer continued liable ; for the reason why indulgence to the acceptor without the drawer's consent discharges the drawer is because it may affect his remedy over against the acceptor ; and that reason does not

Discharging any of the indorsers will be a discharge of all (29) subsequent, though not of prior, indorsers.

An agreement between holder, drawer, and acceptor, that the acceptor shall pay, discharges the drawer, if the acceptor be to pay to a limited extent only;

As, the bill without expenses. (30)

apply where he is not entitled to a remedy over. Verdict for plaintiff.

(29) *Smith v. Knox*, 3 Esp. N. P. C. 46. Per Lord Eldon, "It is said that the holder may discharge any of the indorsers after taking them in execution, and yet have recourse to the others. I doubt of the law as stated so generally; I am disposed to be of opinion, that if the holder discharge a prior indorser, he would find it difficult to recover against a subsequent one."

So also in *English v. Darley*, 2 Bos. and Pull. 62., Lord Eldon, after adverting to the inaccuracy of the marginal abstract of the case of *Hayling v. Mulhall*, said, had the plaintiff first sued a prior indorser and discharged him from execution, it would have afforded a sufficient objection to an action against a subsequent indorser. See *Hayling v. Mulhall*, *antè*, p. 335. n. (16).

(30) *De la Torre v. Barelay*, 1 Stark. 7. The drawers of a bill having become bankrupts, an agreement was entered into between their assignees, the holder (plaintiff), and the acceptor, by which the acceptor agreed to pay the amount of the bill, provided he were not called upon to pay more: the agreement recited the bill, the acceptance, and the probability of its being sent back for nonpayment. Plaintiff having afterward sued the drawers, Lord Ellenborough held this new agreement, which varied the condition of the acceptor, was a waiver of the right of action against defendants, who were represented by their assignees: nonsuit.

Taking a fresh bill from the acceptor, as a collateral security, will not discharge the drawer (31), unless there be a bargain to give time. (31)

Taking the separate notes of one of several partners, at distant dates, as a collateral security, will not discharge the others, if the party insist at the time that it shall not prejudice his claim upon the partnership, and he do not bind himself to wait till the notes are due (32);

(31) *Pring v. Clarkson*, 6 Barn. & Alders. 14. A bill for 85*l.* 8*s.* 7*d.* was dishonoured, and notice given to defendant, the drawer: Geddin and Co. the payees, took it up, and Thompson, the acceptor, afterwards sent them a second bill for 126*l.* but nothing was said or stipulated as to the first bill: Geddin and Co. discounted the second bill, and passed the first to plaintiff on a valuable consideration. It was urged, that by taking the second bill Geddin and Co. virtually gave time to the acceptor upon the first, and discharged the drawer; but, Abbott C. J., and afterwards the Court, held otherwise; for, as the second bill was taken as a collateral security only, it left all the rights upon the first entire.

It does not appear to have been urged, that as plaintiff took the bill after it was due, he could have had no better right than Geddin and Co., and that after using the second bill, they had no right, till the second was dishonoured, upon the first.

(32) *Bedford v. Deakin, Bickley and Hickman*, 2 Stark. 178. Defendants were drawers of a bill, which was dishonoured; they dissolved partnership, and Hickman became bankrupt: Bickley afterwards proposed to give his own notes at four, eight, and twelve months as a security, and one Rushbury added his name as surety: plaintiff, who held the bill, agreed to take the notes, reserving to himself the security he held from the three, and he retained the bill. Interest was calculated on the notes till they would become due. In an action afterwards upon the bill against the three, it was urged, that the taking

Though the partnership were dissolved before such notes were given (32):

Otherwise, if he bind himself to wait. (32)

Receiving dividends under a commission of bankruptcy is a satisfaction *pro tanto* only.

After a partial satisfaction, the holder must (33)

these notes discharged Deakin and Hickman: Lord Ellenborough said, he should have acceded to the objection had plaintiff agreed to postpone his remedy upon the bill, but as he had not, and on the contrary had retained the bill, and expressly reserved to himself that security, he thought the taking the notes did not alter the original liability of the three defendants; and plaintiff had a verdict.

(33) *Bacon v. Searles*, 1 H. Bl. 88. Upon a bill for 95*l.* 10*s.* the drawer paid the plaintiff 60*l.* 10*s.*, and on an action against the acceptor, *he*, the acceptor, paid the residue with the interest into Court; the plaintiff however proceeded, and after a verdict for the defendant with liberty to the plaintiff to move to enter a verdict for him, he contended that the acceptance having made the defendant liable for the whole, and a personal contract not being divisible, he was entitled to recover, and to stand as a trustee for the drawer, but the Court held otherwise, and the verdict stood.

Pierson v. Dunlop, Cowp. 571. In an action against the acceptor upon a bill for 300*l.* the plaintiff took a verdict for the whole sum; the defendant filed a bill against him in the Exchequer, and he admitted in his answer that he had previously received 180*l.* from the drawer; this (among others) was urged as a ground for a new trial, and after cause shown, Lord Mansfield said, "The verdict is certainly taken for 180*l.* more than was due; there was no admission of this payment at the trial, which was very wrong, and has been the occasion of filing a bill in the Exchequer; therefore, there ought to be a deduction of the money received, and a proportionable part of the interest, together with all the costs in the Exchequer;" and though the Court discharged the rule for a new trial, they made

not in an action take a verdict for more than the sum remaining due : if he do, the Court will (34) either make him correct the verdict, and pay any expense the mistake may have occasioned, or grant a new trial.

Satisfaction of a bill or note, as to one of several partners, is a satisfaction as to all ; and if a person be a partner in two firms, satisfaction as to one firm is (35) so as to both : what would bar one firm will bar the other.

the plaintiff remit the 180*l.* with interest upon it from the time it was paid, and pay the costs of the bill and answer in the Exchequer.

However, in *Johnson v. Kennion*, 2 Wils. 262., the defendant drew a bill for 1000*l.* in favour of Benson or order, and Benson indorsed it to the plaintiff ; Benson paid the plaintiff 232*l.*, notwithstanding which, the plaintiff took a verdict for the whole 1000*l.* ; and upon a rule nisi for a new trial upon this ground, the Court are represented to have held that he did right ; but, in *Bacon v. Searles*, *suprà*, Wilson J. considered the report inaccurate, and the authority questionable.

(34) See *Pierson v. Dunlop*, *suprà*.

(35) *Jacaud and Gordon v. French and others*, 12 East's Rep. 917. Jacaud was in partnership with Blair in Ireland, and with Gordon here. Jacaud and Gordon had a bill drawn by Farrell and Co. on defendants, and Farrell and Co. had supplied Jacaud and Blair with funds to pay this bill : Blair misapplied those funds, and on an action on the bill by Jacaud and Gordon, the defence was, that the misapplication by Blair was a misapplication by Jacaud also, and that after being guilty in one house of disappointing payment by misapplying the payment-fund, he could not endeavour to enforce payment in another : and upon a case reserved the Court was of that opinion, and the *postea* was awarded to the defendants.

And it will make no difference though one common partner be in fact, ignorant of the circumstances which constitute the satisfaction.

Thus, if one house receive funds from the drawer to take up a bill, and misapply them, no other house to which any member of the first house belongs can sue the drawer ;

Nor, if he stand in the place of the drawer, the acceptor. (35)

In an action upon a bill or note, the plaintiff is, in general, entitled to recover the money payable thereby, with (36) interest, and (37) all incidental expenses occasioned by non-acceptance or non-payment.

The interest is, in general, to be computed from the time the bill or note would regularly have been payable, and it is, in general, to be carried down to the time when final judgment may be signed. (38)

(36) D. Mar. 2d ed. 13. *Blaney v. Bradley*, Blackst. 761. By the Court, " interest is due on all bills of exchange and " notes of hand payable at a day certain, or after demand, if " payable on demand." See also Bunb. 129. 2 Term Rep. 58.

(37) Vide Mar. 2 ed. 13. In *Symonds v. Parminter*, antè, p. 328. note (1), the plaintiff recovered interest, exchange and re-exchange ; and in *Auriol v. Thomas*, (post, p. 354. n. 51.) 10s. per pagoda in lieu of interest, exchange, and all other charges.

(38) *Robinson v. Blande*, Burr. 1077. In an action upon a bill of exchange, and for money lent, a case was reserved, and the Court was of opinion that the plaintiff could not recover upon the bill, but that he might for the money lent ; but they took time to consider, with a view to settle the future practice, to

Thus, upon a bill or note payable on presentment or demand, interest (39) must be computed from the presentment or demand.

But, if a bill or note payable at a given time after date, be for a specified sum "bearing interest," interest shall be computed from the date. (40)

If a bill be, by the acceptance, made payable at a particular place, the acceptor will not be liable for interest without proof of presentment at that place

what time interest, when payable, should be computed, and afterwards determined that it should be computed to the time of final judgment.

(39) *Blaney v. Bradley*, ante, p. 348. note (36). *Cotton v. Horsemanden*, Pract. Reg. 357. The Court held, that in actions upon promissory notes payable on demand, interest should be given from the time of the demand proved; but, in this case, where it appeared upon the face of the note to be for money lent, interest should be given from the date of the note. 9 Mod. 138., by the Court, "interest upon a bill of exchange commences from demand made."

(40) *Kennerly v. Nash*, 1 Stark. 452. Action on bill at four months after date for 25*l.* 4*s.* bearing interest; and per Lord Ellenborough, "these words entitle plaintiff to interest from the date of the bill; without them, he would have been entitled to it from the time it became due."

Hopper v. Richmond, 1 Stark, 507. By the terms of a note defendant undertook to pay legal interest on demand: Lord Ellenborough held, that must mean from the date of the note.

Denman v. Dibden, 1 Ryan & M. 380. In an action upon the following bill, "Eight months after date pay to me or my order the sum of 100*l.*, for value received with lawful interest for the same," Abbott C. J. was referred to, to say from what time the interest was to be computed, and he answered, "from the date of the bill."

(41), unless there be evidence that the acceptor must have known that a presentment there would have been unavailing.

It has, indeed, been holden (42), that if a party, entitled to notice of the dishonour of a bill or note, offer to pay it within a reasonable time after the notice is given, he is not liable for interest from the

(41) *Phillips v. Franklin, Gow.* 196. In an action against the acceptor upon two bills where the acceptance pointed out a particular place for payment, there was no proof of presentment at that place: and per Holroyd J., "I think you cannot support your claim for interest: though it be unnecessary to prove the presentment in order to recover the principal, the right to interest depends upon a different consideration."

(42) *Walker v. Barnes*, 5 Taunt. 240. A bill for 10*l.*, due 11th June, was presented for payment on that day, and dishonoured. On the 12th, notice was sent by letter to the drawer, and early on the 13th, he tendered the 10*l.*; the 10*l.* was not accepted, and on an action against the drawer, it was urged for the plaintiff, that the tender was insufficient, for that defendant ought to have tendered the interest from the 11th to the 13th; but on the point being reserved, the Court held it sufficient, if the drawer, within a reasonable time after the notice, tendered the principal without the interest; and judgment was given for the defendant.

Note, the interest would have been under three farthings, — one fifteenth part of ten pence. But quære, whether non-payment by the drawee was not a breach of the drawer's contract, and whether the holder was not entitled to interest, for not receiving on the 11th what defendant undertook he should receive on that day. It may be observed, however, in support of this decision, that the constant form in assumpsit against a drawer or indorser, makes him promise only for the amount of the money mentioned in the bill. It is silent as to interest. It is, however, silent also as to expenses.

time of the dishonour : but, perhaps, there might be risque in acting upon that decision.

Where all that is due is tendered, and the holder has mislaid the bill or note, so that he cannot give it up, and payment is, on that account, postponed, the interest shall be computed up to the time of such tender only. (43)

The language of 3 & 4 Ann. seems to imply, that a neglect to procure a protest upon any inland bill for the payment of 20*l.* upon which a protest might have been made (44), would preclude the holder from recovering such interest or expenses from any person entitled to notice of the non-acceptance or non-payment ; but the contrary is now settled. (45)

Whether it would preclude the holder of a coal-note given under 3 G.2. c.26. § 7. is not decided.

A jury is not bound to give interest upon a bill or note; and where the bill or note has lain dormant for many years without any claim being made upon it, they may properly refuse it. (45*)

(43) See *Dent v. Dunn*, antè, 336.

(44) See 3 & 4 Anne, c. 9. § 5. antè, p. 264. note (91).

(45) See *Windle v. Andrews*, antè, p. 263. n. (90).

(45*) *Du Belloix v. Lord Waterpark*, 1 Dowl. & R. 16. Payee against maker, on note for 800*l.*, of 27th December, 1787, payable six months after date. The cause was tried in 1821; there was no evidence of any claim upon the note from the time it was made, and for many years of the intermediate time plaintiff had been an alien enemy : the jury asked if they were bound to give interest, and Abbott C. J. told them *that was for their*

And for any time that it has been in the hands of an alien enemy interest ought not to be allowed; because during that time, payment of the principal would have been illegal. (45 •)

The only incidental expense in the case of the person who made the presentment is the charge of the noting and protest; in the case of any antecedent party, that of the return of the bill or note must be added.

Upon a foreign bill the (46) re-exchange forms a

consideration; and they gave none. A motion was made to increase the verdict by adding the interest, or for a new trial; but the Court was clear that the question of interest was within the province of the jury; that it was in the nature of damages for the nonpayment of the debt; that they were to say whether there should be any and what damages on that account, and that in this instance there was no ground for saying they had not exercised their discretion rightly. Abbott C. J. added, that during the time the plaintiff was an alien enemy, it would have been illegal to have paid him the debt, and that for that interval therefore damages could not legally have been given; the rule was refused.

(46) *Mellish v. Simeon*, 2 H. Blackst. 378. A bill was drawn in London upon Paris, and negotiated through Holland; before it became due the French government prohibited the payment of any bill drawn in England, in consequence of which it was dishonoured, and sent back, through the different hands by which it had before been negotiated, to London; the re-exchange between Paris and Holland, raised the bill from 60*9*l. 1*9*s. 10*d.* to 90*5*l. 1*3*s. 9*d.*, and the re-exchange between Holland and London to 91*3*l. 4*s.* 3*d.*, which the plaintiff (the payee) paid; and upon an action by him against the drawer, Eyre C. J. left it to the jury, whether the defendant was liable for the re-exchange occasioned by returning the bill through Holland, and they found that he was. An application was

part of the expense of the return, and let the bill be returned through ever so many hands, the (46) drawer is liable for the re-exchange upon each return.

And the (47) drawer is liable for the re-exchange and every other expense arising from the non-acceptance or nonpayment, notwithstanding the dishonour of the bill was expressly ordered by the country on which it was drawn.

It has been said (48) that the acceptor is not liable for re-exchange, and that his contract cannot be carried further than to pay the sum specified in the bill, together with legal interest where interest is due; but if by his breach of contract the expense of re-exchange be actually incurred, ought he not to pay it? (49)

If, by the terms of a note, the holder have the option of being paid either at the place where it was made, or, "according to the course of ex-

made for a new trial upon the ground that the defendant was not liable for the re-exchange, because there was no default in him, the payment being prohibited by the government of France; but the Court held it immaterial why the bill was not paid, that as it was not paid, he was liable to all the consequences, of which the re-exchange was one, and the rule was refused.

(47) See the preceding note (46). Vide *Detastet v. Baring*, 11 East's Rep. 265.

(48) In *Napier v. Schneider*, 12 East, 420, post,

(49) Pothier says he ought to pay it: and in *Francis v. Rucker*, Amb. 672. the drawer was in effect allowed to prove it under a commission against the acceptor. See Co. B. L. 176. 2 Bro. Chan. Ca. 599.

change" between that place and another, he (50) may insist upon being paid according to such course of exchange as exists between them at the time when the note becomes due.

And it makes no difference, that at the time when the note was made there was a direct course, and at the time when it becomes due there is no direct, but only a circuitous course of exchange between them.

On the return of a bill drawn here for the payment of pagodas in the East Indies, the (51) prac-

(50) *Pollard v. Herricks*, 3 Bos. and Pull. 335. The defendant gave the plaintiff a note for payment, at seven days' sight, of 1200 livres Tournois and interest, drawn at Paris, and expressed to be "payable as above in Paris, or, at the choice of the bearer, at the Union Bank in Dover, or at my usual residence in London, according to the course of exchange upon Paris." In an action on this note the defendant paid 18*l.* 16*s.* 6*d.* into Court. The jury found a verdict for the plaintiff with 40*l.* 6*s.* 10*d.* damages, subject to the opinion of the Court upon a case stating the making of the note, and the due presentment in London, and that, at the time when the note was made, there was a direct course of exchange between London and Paris, that that exchange had fallen, and before the note became due had altogether ceased; that, according to the last direct course, 18*l.* 16*s.* 6*d.* would be sufficient to pay the note: that when the note became due there was no direct course, but that a circuitous course of exchange through Hamburgh existed, and that, according to that circuitous course, the sum of 59*l.* 3*s.* 4*d.* would be due upon the note. The Court held, that the plaintiff had a right to insist upon being paid according to such circuitous course, and the verdict therefore was entered for 40*l.* 6*s.* 10*d.*

(51) *Auriol v. Thomas*, 2 Term Rep. 52. Upon executing a writ of enquiry on a bill for the payment of 800 star pagodas

tice is to allow for the sum payable by the bill, interest, and all incidental charges, after the rate of 10s. for each pagoda, and five per cent. thereon from the expiration of thirty days after notice of the bill's dishonour; and it has been (51) determined that this practice was lawful, even where the price allowed for each pagoda on the discount of the bill was only 6s. 6d.

The action usually brought on account of a bill or note, is a special action of assumpsit thereon; but, perhaps, a special action (52) of debt, debt on

returned protested from India, it appeared that the usage was to charge 10s. per pagoda for bills returned from India protested, and five per cent. after the expiration of thirty days from the notice to the defendant of the bill's dishonour, which included all incidental charges, and that the defendant had agreed to pay accordingly; upon which the jury assessed the damages at 10s. per pagoda, with the five per cent., though the plaintiff discounted the bill at the rate of 6s. 6d. a pagoda; that being then the current price. A rule nisi was obtained to set aside the inquisition, on the ground that this allowance was exorbitant, and the agreement for it usurious; but the Court, on cause shown, thought otherwise, and discharged the rule.

(52) In *Anon.* Hardr. 485, it was held that the payee of a bill could not maintain debt against the acceptor, because there was no privity between them, and because the acceptance was a collateral undertaking only. In *Welch v. Craig*, *Stra.* 680. 8 Mod. 373, it was held that debt will not lie upon a note; but it does not appear by or against what particular party that action was brought. In 1 Mod. Ent. 812. pl. 13, it is said that debt will lie against the maker of a note, not against the indorser. And in *Morgan's Precedents*, 458, is an entry of a declaration in debt by the administratrix of the payee of a note against the maker; and in *Rumball v. Ball*, 10 Mod. 38, an action of debt was brought upon a note.

an indebitatus, or an (53) indebitatus assumpsit, might be maintained thereon.

And assumpsit will lie upon a bill or note against a corporation, where such corporation is empowered by statute to issue, indorse, or accept bills or notes. (54)

Debt (55) may be maintained by the payee

(53) In *Brown v. London*, 1 Freeman, 14. 1 Mod. 285. 1 Vent. 152, it was held, that an indebitatus assumpsit would not lie upon the acceptance of a bill, *Twisden J. dubitante*. And there is a dictum to the like effect in *Comb.* 204. But in another report of *Brown v. London*, Lev. 298, the Court is stated to have resolved in favour of the defendant, because the custom was not set out in the count. In *Skinn.* 346, it is said, it will only lie against the drawer upon a bill importing to have been given for value received. In *Salk.* 125. 12 Mod. 37, it is laid down generally, that an indebitatus assumpsit will not lie upon a bill; and in 12 Mod. 345, it is held that the payee of a bill importing to have been given for value received, may maintain an indebitatus assumpsit against the drawer. And it may be observed, that the demand of an indorsee upon a bill or note against indorser, drawer, maker, or acceptor, is continually allowed as an item of set-off under the statutes of set-off.

(54) *Murray v. East India Company*, 5 B. and Ald. 204. Assumpsit against the East India Company as acceptors of certain bills of exchange: it was urged, that assumpsit could not be brought against a corporation; but the Court, without intimating how that would be in general, held, that as the East India Company was, by 53 G. 3. c. 155. § 57, and other acts, expressly authorised to accept bills, those statutes were to be considered as virtually making them liable to the ordinary remedies upon bills, and consequently to the action of assumpsit.

(55) *Bishop v. Young*, 2 Bos. and Pull. 78. This was an action of debt by the payee, against the maker of a promissory note, expressed to be for value received. The first count of the declaration was upon the note; and upon general demurrer

against the maker of a note expressed to be for value received (56);

Or by the drawer against the acceptor, where the bill is payable to the drawer's order and expressed to be for value received. (56)

But instead of suing upon the bill or note, the holder may use it merely as evidence in another action.

A bill is *primâ facie* evidence of money lent by the payee to the drawer; and a note, of money (57) lent by the payee to the maker; and each,

to this count, the Court, after time taken to consider, held, that in this particular case the action of debt was maintainable. But Lord Eldon, who delivered the opinion of the Court, said, "We do not say how the case would stand if the action were brought by any other person than he to whom the note was originally given, or against any other person than him by whom it was signed and made, or if the note itself did not express a consideration upon the face of it." Judgment for the plaintiff.

(56) *Priddy v. Henbrey*, 1 Barn. and Cr. 674. Debt against the acceptor on a bill for 30*l.*, drawn by plaintiffs, payable to plaintiffs or their order, importing to be for value received in goods. Demurrer, and it was urged, that the action of debt was not maintainable; but, on argument and time to consider, Holroyd and Bayley Js. before whom alone it was argued, held, that as the bill imported to be for value received, and as the action was by drawer against acceptor, between whom there was immediate privity, the action was maintainable, and judgment for plaintiff.

See also *Thompson v. Morgan*, post, p. 359. n. (59).

(57) *Clarke v. Martin*, Lord Raym. 758. Holt C. J. expressed his disapprobation of declaring upon promissory notes (before the statute) as if they were within the custom of mer-

consequently, of money (58) had and received by the drawer or maker to the use of the holder, and of money paid by the holder to the use of the drawer or maker.

An acceptance is (59) also *primâ facie* evidence

chants; and assigned as a reason, "because there was so easy a method as to declare upon a general *indebitatus assumpsit* for money lent." The same was laid down in 12 Mod. 380. and in Burr. 1525. Lord Mansfield says, "I do not find it any where disputed, that an action upon an *indebitatus assumpsit* generally, for money lent, might be brought on a note payable to one or order." And see *Smith v. Kendall*, *antè*, p. 34. n. (73).

(58) *Grant v. Vaughan*, Burr. 1516. The bearer of a note payable to "Ship Fortune or bearer," brought an action upon it, and inserted a count for money had and received. Lord Mansfield left it to the jury whether such a note was negotiable, and whether the plaintiff took it fairly, and they found for the defendant; but upon a rule nisi for a new trial, the Court was clear the first point should not have been left to the jury; and per Lord Mansfield, "Upon the count for money had and received, the case is clear beyond dispute; for undoubtedly an action for money had and received to the plaintiff's use, may be brought by the *bonâ fide* bearer of a note payable to bearer. It was certainly money received for the use of the original advancer of it, and if so, it is for the use of the person who has the note as bearer;" and *Wilmot and Yates Js.* expressed themselves to the same effect. A new trial was granted, and the plaintiff recovered.

(59) *Tatlock v. Harris*, 3 Term Rep. 174. In an action by the indorsee of a bill payable to a fictitious payee against the acceptor, who was also one of the drawers, the declaration contained counts, for money paid, and for money had and received: it appeared upon the evidence, that the defendant was indebted to one of the indorsers, and sent him this bill, for which he was credited in account, and that the plaintiff paid

of money had and received by the acceptor to the use of the holder, and of money paid by the holder to the use of the acceptor; and (60) an indorsement, of money lent by the indorsee to the indorser.

But if it appear that, at the time of accepting, the drawee says he has nothing in his hands except a bill of the drawer's for a larger amount, but that he expects the drawer will remit, and will there-

that indorser the value of the bill: and upon a demurrer to the evidence, the Court held that the plaintiff was entitled to recover under the counts for money paid and money had and received, and he had judgment accordingly.

Vere v. Lewis, 3 Term Rep. 182. This was a similar action to that of *Tatlock v. Harris*, except that the defendant was not one of the drawers, and there was no evidence that he received any value for the bill; upon which it was urged the plaintiff could not recover upon the money counts; but the Court said the acceptance was evidence that he had received value from the drawers, and the plaintiff had judgment.

Thompson v. Morgan, 3 Campb. 101. Plaintiff drew on defendant, payable to plaintiff or order: defendant accepted: plaintiff sued on the acceptance, but there being a variance between the bill as stated, and the real bill, plaintiff resorted to the money counts. Lord Ellenborough at first doubted, because *indebitatus assumpsit* would not lie on the bill against the acceptor; but it being pointed out to him that plaintiff was drawer and payee, so that there was no intermediate party between plaintiff and defendant, he admitted the bill as evidence under the count for money had and received; but he would not allow interest. Verdict for plaintiff. See also *Priddy v. Heubrey*, *antè*, p. 357. n. (56).

(60) *Kessebower v. Tims*, B.R. Pasch. 22 G. 3. Lord Mansfield held, that the indorsee of a note might maintain *indebitatus assumpsit* for money lent, against the person who indorsed it to him.

fore take all risks upon himself, the acceptance will not be evidence of money had and received by the acceptor to the use of the holder, unless there be proof that the larger bill has been paid (61) ;

Or other money remitted ;

With that proof, it will. (61)

Proof that the drawee has received a remittance from the drawer specifically for payment of the bill, will also make the drawee, though he has not accepted the bill, answerable to the holder for money had and received, if he have done any thing which can be deemed a pledge to the holder for so applying it.

(61) *Whitwell v. Bennett*, 3 Bos. and Pull. 558. In an action by the indorsee against the acceptor of a bill, the bill was incorrectly stated, and the plaintiff was, therefore, obliged to resort to the money counts. The evidence was, that when the defendant accepted the bill (which was for 30*l.*), he said, that though the drawer had not remitted to him, he expected that he would, and that, as he had a bill of his for 80*l.* which would be paid, he would take all risks upon himself. Lord Alvanley directed a verdict for the plaintiff, with liberty to the defendant to move for a nonsuit. Rule nisi accordingly ; and on showing cause against this rule, it was urged, that if the bill for 80*l.* was paid, the defendant was liable as for money had and received : and that, as the defendant had not at the trial produced that bill, the presumption was, that it was paid. The Court said, that if that bill was paid, the action for money had and received would be maintainable, on the ground of the defendant's specific appropriation of that money to the payment of the plaintiff's demand : but that the declaration being upon the bill for 30*l.* it was a surprise upon the defendant to call for proof of the nonpayment of the other bill ; and that, therefore, it would be too much to presume payment of that bill. Rule absolute.

And proof that the acceptor's banker has received the money from the acceptor specifically for the bill, will make the banker liable to the holder for money had and received, if he do any thing which can be deemed a pledge to the holder. (62)

Taking the bill as agent to the holder, to receive payment thereon if payment be offered, is such a pledge, and will make him answerable for money had and received, if the money be paid to him whilst the bill is so in his possession ;

At least if it be owing to such possession that he receives the payment. (62)

But, a specific remittance will not make the drawee, if he do not accept, answerable to the holder as for money had and received, unless there be something which can be deemed a pledge to the

(62) *De Bernales v. Fuller*, 2 Campb. 426. 14 East, 590. n. Plaintiff held a bill accepted by Puller, payable at defendants', Puller's bankers: plaintiff sent the bill to his own bankers, and they, according to the course amongst bankers, sent it to defendants'. Puller found the bill was at defendants', and sent the money there to pay it: defendants' clerk took the money, but refused to give up the bill, and defendant insisted on keeping the money for a debt Puller owed them. Plaintiff thereupon brought an action for money had and received. Lord Ellenborough thought it not maintainable, and the defendants had a verdict; but, on an application for a new trial, and cause shown, the Court held that, as defendants made themselves agents for plaintiff by taking the bill from his bankers, and as they would not have had the money paid them had they not had possession of the bill, they were not at liberty to say they did not receive the money for plaintiff's use: a new trial was accordingly granted, and plaintiff afterwards had a verdict.

holder; without such pledge there is no privity between the holder and the drawee, and the drawer is the only person who can call the drawee to account for the misapplication. (63)

An acknowledgment by the acceptor of his liability under his acceptance will enable the holder to recover against him upon a count for the account stated. (64)

(63) *Yates v. Bell*, 9 Barn. and A. 643. Ingram remitted 800*l.* to defendant to take up, amongst others, a bill for 743*l.*, but that bill being returned dishonoured, defendant wrote to Ingram that he should carry the money to his credit: the bill coming back, the holder brought an action against the defendant for money had and received, on the ground that defendant was bound to apply the money to his bill. Abbott C. J. thought he was not, and nonsuited; and on a rule to show cause why the verdict should not be entered for plaintiff, and cause shown, the Court held the nonsuit right, for there was no privity between plaintiff and defendant, unless defendant assented to apply the money as Ingram directed; if he did not follow Ingram's directions, he might be accountable to Ingram, but not to the plaintiff, and the rule was discharged.

Stewart v. Fry, 7 Taunt. 339. A bill made payable at defendant's was dishonoured for want of advice; the same day defendant received the money from Aspinall, the acceptor (qu.?), to pay it, and he sent to plaintiff, who had presented it, but the bill was returned to Ireland. Aspinall called back the money, and defendant paid him; the bill came back to plaintiff, and he sued defendant for the money; the jury found for defendant, and on rule nisi for a new trial, the Court held the verdict right, and discharged the rule.

S. P. upon a remittance to pay a common debt, *Williams v. Everitt*, 14 East, 582.

(64) *Higlmorc v. Primrose*, 5 M. and S. 65. In an action against the acceptor of a bill, plaintiff was precluded by a

Against the very person also from whom he received the bill or note, the holder may sue for the consideration upon which the bill or note was given, if it were given for a pre-existing demand.

For, in general, a bill or note is (65) no satisfaction of any debt or demand for which it has been

variance from recovering on the special count, but he proved, that defendant had acknowledged the acceptance and pleaded inability to pay; and upon the point reserved, the Court held, this entitled plaintiff to a verdict on the count for the account stated, and he had judgment accordingly.

(65) *Puckford v. Maxwell*, 6 Term Rep. 52. The defendant having been arrested by the plaintiff for 80*l.*, gave a draft for 45*l.*, and promised in a few days to settle the remainder, on which the plaintiff consented to his being discharged out of custody. The draft was dishonoured, and the defendant was again arrested on the same affidavit. On rule to show cause why he should not be discharged out of custody, and cause shown, it was urged, that the draft, having been accepted as part payment, could not be treated as a nullity. But per Lord Kenyon: "In cases of this kind, if the bill which is given in payment, do not turn out to be productive, it is not that which it purports to be and which the party receiving it expects it to be; and, therefore, he may consider it as a nullity and act as if no such bill had been given. These questions have frequently arisen at *nisi prius*, where they have always been determined the same way." Rule discharged.

Owenson v. Morse, 7 Term Rep. 64. The plaintiff bought some plate of the defendant, and gave him some country bank-notes in payment; the notes were dishonoured, on which the defendant refused to deliver the plate. The plaintiff brought trover, and insisted that the notes were payment; but on a case reserved, the Court held that they were no payment unless the defendant had agreed to take them as payment, and to run the risk of their being paid. Nonsuit entered. See also *Tapley v. Martens*, 8 Term Rep. 451.

given; it is only *prima facie* evidence of payment, rendering it necessary that the party receiving it should (66) account for it, before he will be entitled to recover the consideration.

But the holder will be precluded from recovering

(66) *Kearslake v. Morgan*, 5 Term Rep. 513. *Assumpsit* for goods sold and delivered, and for money lent. The defendant pleaded the general issue; and that as to 4*l.* 14*s.* 6*d.* one W. P. made his note for 10*l.* payable to the defendant or order, at a time which elapsed before the commencement of the suit; and that the defendant, before the note became due, indorsed it to the plaintiff "for and on account of the said sum of 4*l.* 14*s.* 6*d.* "and the sum of 5*l.* 5*s.* 6*d.*," paid by the plaintiff to the defendant, and that the plaintiff accepted the note "for and on account "of" those sums. To this plea there was a general demurrer, and it was urged, that the plea ought to have alleged that the note was received in *satisfaction* of the debt. But the Court, on argument, held the plea good; as the note might be outstanding and a demand might be made upon it; and they advised plaintiff to withdraw his demurrer, and reply; which he did.

Dangerfield v. Wilby, 4 Esp. N. P. C. 159. The declaration contained a count upon a note made by the defendant, payable to the plaintiff and the money counts. At the trial the note was stated to have been lost, but no evidence of that fact was offered. It was proved, however, that on the money being demanded, the defendant had apologised for not having paid the money *on account of the note*. This was the whole of the plaintiff's case; and he contended that the note was only evidence of the consideration (which was stated to have been money lent), and that he might abandon the note, and go for the consideration. But Lord Ellenborough said, that as the note for any thing that appeared in evidence was in existence, it might still be in circulation, so that the defendant might be subjected twice to the payment of the same demand; without, therefore, proving the note lost, the plaintiff was not entitled to recover. Nonsuit. See *Champion v. Terry*, post.

for the consideration, if it appear that the bill or note has been, by (67) laches or loss, made to operate as a satisfaction of the debt or demand for which it was given; or if he originally received the bill or note (68) as cash, and took upon himself the risk of its being paid; or if it were transferred to him by way of (69) sale; unless, indeed, in the

(67) Vide *antè*, cap. vii.

(68) In *Owenson v. Morse*, 7 Term Rep. 66. *antè*, p. 363. n. (65) Lord Kenyon said, "If the defendant had agreed to take the notes as payment, and to run the risk of their being paid, that would have been considered as payment whether the notes had or had not been afterwards paid." See also *Clark v. Mundal*, 1 Salk. 124. and *ex parte Hodgkinson*, 19 Ves. 295.

(69) *FydeU v. Clarke and another*, 1 Esp. N.P.C. 447. The plaintiff had been in partnership with his brother R. FydeU, and the latter on his own account, but in the partnership name, drew certain notes to the amount of 8000*l.* which he discounted with Hurlock and Co. bankers. The plaintiff, after his brother's death, voluntarily paid the 8000*l.* to the bankers, supposing that his brother had received the amount of these notes in money: he afterwards discovered that they had only given other bills and notes, which they had not indorsed, in lieu of his brother's notes, some of which bills and notes, to the amount of 4300*l.*, proved unproductive; and to recover that sum, the present action was brought against the defendants, who were trustees of the insolvent estate of the bankers, and who had reserved funds to answer the event of the action. Lord Kenyon said, that the bankers, by not indorsing the bills and notes, had refused to pledge their credit to their validity, and that R. FydeU must be taken to have received them on their own credit only; and that therefore the action could not be supported. Nonsuit.

Ex parte Shuttleworth, 3 Ves. 368. Newton gave the bankrupt, before his bankruptcy, cash for a bill, but refused to allow the bankrupt to indorse it, thinking the bill better without his

two latter cases, it be proved that the person transferring the bill or note (70) knew at the time, that it was of no value.

A bill or note will satisfy a preceding debt, if the holder make it his own by laches (71):

As by not presenting it for payment when due (72);

name. He now proved the amount under the commission, and on petition to have the debt expunged, the Chancellor granted the petition, observing that this was a sale of the bill.

(70) In *Fenn v. Harrison*, 3 Term Rep. 759, Lord Kenyon said, "It is extremely clear that if the holder of a bill send it to market without indorsing his name upon it, neither morality nor the laws of this country will compel him to refund the money for which he sold it, if he did know at the time that it was not a good bill. If he knew the bill to be bad, it would be like sending out a counter into circulation to impose upon the world, instead of the current coin. In this case, if the defendants had known the bill to be bad, there is no doubt but that they would have been obliged to refund the money."

(71) *Bridges v. Berry*, 3 Taunt. 130. Defendant accepted a bill for 119*l.* due 20th October, but did not pay it: plaintiff was the holder; defendant afterwards lodged in plaintiff's hands as a security, a bill drawn by defendant upon one Ivory, for 117*l.* 11*s.* 2*d.* and paid plaintiff the difference: this bill was dishonoured, but no notice thereof was given to defendant: action by plaintiff on both bills. It was admitted at the trial that defendant was discharged from the second bill, but it was urged that he continued liable on the first: but Mansfield C. J. and the Court held he did not, and nonsuit; and rule to set it aside refused.

See *Swynyard v. Bowes*, *antè*, p. 288, note (133).

(72) *Bishop v. Rowe*, 3 M. and S. 362. Plaintiff sued the drawer and acceptor of a bill, and proved the necessary facts: defendant gave in evidence, that after the bill was due and part paid, one Tucker who had been connected with the bill, but

Though it were taken from a third person (72);

And in such case plaintiff must prove the bill was duly presented (72);

But he need not prove notice to such third person of the bill's dishonour. (72)

If the holder of a bill or note employ a particular agent to get it discounted, but refuse to indorse it, and the agent guaranty its payment, the principal will (73) not be bound by such guaranty; and not being bound, a subsequent promise by him to pay the amount of the bill or note, will be (73) *nudum pactum*.

had not indorsed it, drew for the balance on Lewis at two months, and gave plaintiff the draft: plaintiff could not prove that the draft was presented for payment, but he nevertheless had a verdict: the Court, however, thought that proof essential, and granted a new trial. On the second trial, plaintiff gave this proof, but he could not prove that he had given notice to Tucker of the dishonour: the point was saved, whether he was bound to give this proof; and on rule nisi for nonsuit, and cause shown, the Court held it sufficient for him to prove presentment and nonpayment, for that showed there had been no payment in fact; and if the defendant insisted there had been such neglect as amounted to payment in law, he should have shown it. The rule was discharged.

(73) *Fenn v. Harrison*, 3 Term Rep. 757. and 4 Term Rep. 177. The defendants employed F. Huet to get a bill discounted, but said that they would not indorse it; F. H. employed his brother James H. and said he would indemnify him if he would indorse it; James indorsed it, and the plaintiffs discounted it: the bill being dishonoured, the plaintiffs applied to the defendants, who promised to take it up, but did not; and this action, for money had and received and money paid, was brought against them. Lord Kenyon told the jury, that if they thought

But, if no restraint be imposed on such agent, the principal (73) may be bound by his guaranty; at least, such guaranty will be a (73) sufficient consideration to support a subsequent promise by the principal to pay the bill or note.

In case of a transfer by delivery, no action can be brought against the deliverer, except on account of the consideration.

And upon a mere discount of a bill, if *A.*, to whom the money is advanced and by whom the bill is transferred, be not liable thereon, either as drawer, acceptor, or indorser, and the bill be afterwards dishonoured, *B.*, the transferee by whom the money was advanced, is without remedy as against *A.*; the presumption being, that the bill in the state in which it was transferred, *i. e.* without *A.*'s security, was the whole consideration for the

that James H. had made himself answerable as agent for the defendants, that was a sufficient consideration for their promise. A verdict was found for the plaintiffs; and on a rule nisi for a new trial, and cause shown, Lord Kenyon inclined to think the verdict right; because, though the agent had exceeded his authority, he thought the principal bound by what he did: the other judges differed, because F. H. was a *particular* agent only: and the rule was made absolute. On the next trial it did not appear that the defendants had told F. H. that they would not indorse the bill. A verdict was found for the plaintiff, and on a rule nisi for a new trial, and cause shown, the whole Court thought the verdict right; because, as F. H. was not restrained as to the mode of getting the bill discounted, the defendants were bound by his act. But Buller and Grose Js. said, that if the facts had been the same, they should have continued of their former opinion. Rule discharged.

money advanced, or in other words, that the transaction was a sale of the bill. (74)

But this presumption may be rebutted by evidence of an intention to the contrary. (75)

If a bill or note be destroyed by fire or other accident, an action may perhaps be brought thereon as if it were in esse. (76)

But, if a bill or note be lost, there can be no remedy upon it at law, unless it was in such a state, when lost, that no person but plaintiff could have acquired a right to sue thereon. (77)

(74) Lord Raym. 442. 15 East, 12. 13. 10 Ves. 206. *Fyde v. Clarke*, and *ex parte Shuttleworth*, *suprà*, ns. (69) (70).

(75) "There is a great difference between transferring a bill without putting your name to it, and indorsing it; in the one case it is a sale, and in the other a discount; subject, however, to the question of intention, whether the transfer was meant to take effect as a sale or as a discount?" Per Lord Eldon, in *ex parte Isbester*, 1 Rose, 23. *post*.

(76) See *Pierson v. Hutchinson*, *infra*. *Mayor v. Johnson*, *post*, p. 374., but see *Hansard v. Robinson*, *post*, p. 373.

(77) *Pierson v. Hutchinson*, 2 Campb. N. P. C. 211. In an action by an indorsee against the acceptor of a bill, it appeared that the bill had been lost after indorsement, and the plaintiff had offered the defendant an indemnity. But Lord Ellenborough nonsuited the plaintiff, saying, that if the bill had been proved to have been destroyed, he should have had no difficulty in receiving evidence of its contents, and in directing the jury to find for the plaintiff; but that having been lost, after indorsement by the payee, it might still be in the hands of a bona fide indorsee for value, who might sue the defendant upon it. And as to the indemnity, he said a court of law could not enquire into its sufficiency.—S. P. ruled by Lord Eldon. See *ex parte Greenway*, 6 Ves. 812.

As, if it were specially indorsed to plaintiff, and had no indorsement from him upon it. (78)

Where it is so specially indorsed, an action may, perhaps, be brought thereon. (78)

If a man take a bill or note for an antecedent debt, and lose it before it is due, with a blank indorsement thereon, he cannot sue upon the bill or note; (79)

Nor for the antecedent debt; (79)

(78) *Long and another v. Bailie*, 2 Campb. N. P. C. 214. This was an action against the acceptor of a bill of exchange, payable to the order of the drawer, and by him specially indorsed to the plaintiffs. It was proved that a person took the bill to have it compared with the affidavit to hold to bail, that a copy was then taken, and that the bill was afterwards stolen from such person. The correctness of this copy and the special indorsement were proved, and upon this the plaintiffs had a verdict.

(79) *Champion v. Terry*, 3 Brod. & Bingh. 295. Plaintiff sued defendant as indorsor of a bill, and for goods sold: the bill was drawn by A., accepted by B., and defendant indorsed it in blank to plaintiff for a debt defendant owed plaintiff for goods sold: plaintiff sent the bill, before it became due, by the post, but it never reached its destination: after the time when it became due plaintiff sued defendant upon his indorsement and for goods sold; it did not appear that any enquiry had been made after the bill, or that the loss had been advertised: the jury found for defendant. A rule nisi was obtained for a new trial, on the ground that the bill was not taken absolutely in payment of the debt, but conditionally only, provided it should be satisfied; that plaintiff might still, therefore, sue for the prior debt, and that the non-arrival of the bill was evidence of its loss: but on cause shown against the rule, the Court thought there was not sufficient proof of the loss; and if there were, as the plaintiff by losing the bill had deprived the

Unless he can show that the bill has been actually destroyed, so that no claim can ever be made thereon against the person he sues. (79)

Nor even then, if such person could have sued upon the bill on taking it up. (79)

But, if the bill or note were unindorsed, and no valid claim can be made thereon for want of such indorsement, the loser is not precluded from suing for the antecedent debt (80);

Or upon the bill or note;

Unless the defendant would have had a remedy over upon the bill or note upon paying it.

Where the person paying is entitled to require an indemnity, the only remedy on a lost bill is in

defendant of his remedies over upon it against the drawer and acceptor, it would be unjust to allow him to sue the defendant for the prior debt; and they discharged the rule. They referred to *Davis v. Dodd*, and *Dangerfield v. Wilby*, antè p. 364, and observed that in *Long v. Bailie*, antè, p. 369, the bill was specially indorsed.

(80) *Rolt, assignee of Welsford, v. Watson*, 4 Bingh. 273. In an action, after Hilary Term 1827, for goods sold, the defence was, that defendant had accepted a bill for the amount drawn by Welsford and payable to Welsford's order, and due January 1826; and that that acceptance had never come in, so that defendant might still be called upon to pay it. Plaintiff proved that Welsford lost the bill without ever having indorsed it: and on rule nisi to enter nonsuit and cause shown, the Court held that as Welsford had lost the bill without ever having indorsed it, defendant could never be called upon to pay that acceptance, and if not, the possible existence of that acceptance was no reason why he should not pay for the goods. Rule discharged.

equity : a court of equity can enquire into the sufficiency of an indemnity ; a court of law cannot. (81)

The acceptor is not liable to be sued upon a *lost* bill, if the loss were before the bill was due, though he promised to pay it after knowing of the loss : unless there were some new consideration for such promise. (82)

The holder's only remedy is to enforce the giving a new bill under 9 & 10 W.3. c. 17. s.3. (82)

If a bill be lost after action brought thereon, and defendant suffer judgment by default, the Court will, on a copy verified by affidavit, refer it to the master to see what is due thereon ; (83)

(81) *R. Hansard v. Robinson*, post, p. 373, so *Pierson v. Hutchinson*, antè, p. 369.

(82) *Davis v. Dodd*, 4 Taunt. 602. Action on bill payable to Allen or order, accepted by defendant, and indorsed generally to plaintiff : plaintiff lost it before it was due, but defendant, after knowing of the loss, promised repeatedly to pay it. Lord Ellenborough, however, held the action not maintainable, and nonsuit ; and on motion for a new trial, the Court agreed with him : they thought defendant under no moral obligation to pay plaintiff, who by his negligence had exposed defendant to the danger of being compelled to pay another holder, and that his subsequent promise, there being no new consideration, was nudum pactum : they said, enforcing the giving a new bill under the statute, seemed to be plaintiff's only course. See the statute, antè, p. 131.

(83) *Brown v. Messiter*, 3 M. & S. 281. The acceptor of a bill desired to see the bill, and then he admitted the acceptance, and promised payment : he suffered judgment by default ; and the bill having been stolen from plaintiff's attorney's

Especially where the bill has been shown to defendant, and he has admitted his signature, and promised payment. (83)

But, if the bill be lost after action brought, and defendant resist the action, and put the plaintiff to prove the bill, the loss will be no excuse for the non-production of the bill, and plaintiff will not be able to recover. (84)

And it will make no difference though the bill were of so old a date that the statute of limitations has attached upon it.

Nor will it make a difference though the defendant admitted the acceptance, and his liability before the bill was lost. (85)

Losing a bill implies negligence in the loser, and the inevitable results of negligence ought to fall upon him. (85)

pocket, rule nisi to refer on production of copy verified by plaintiff's attorney; and no cause being shown, rule absolute.

(84) *Poole v. Smith*, Holt. 144. In action by indorsee against acceptor, it appeared that a few days before the trial the bill was picked out of the pocket of plaintiff's attorney's clerk; and that defendant had admitted the acceptance, but said it had been satisfied between him and the drawer: the bill had been due above six years. Gibbs C.J. thought the non-production of the bill called upon him to nonsuit plaintiff, and that the statute of limitations made no difference: he said the rule was salutary, and ought not to be relaxed.

(85) *Hansard v. Robinson*, 7 Barn. & Cr. 90. Defendant accepted a bill due November 1823, but it was not presented for payment till May 1824: defendant then offered to give another bill in payment, but before such bill was given, plaintiff's clerk lost the original bill: plaintiff informed defend-

If a bill or note transferable by delivery be cut in halves, and half be lost, the holder cannot sue at law upon the other half. Payment at law cannot be enforced unless the entire instrument be produced, or unless there be proof that the entire instrument, or whatever part of it is wanting, has been destroyed. (86)

ant of the loss, and offered him an indemnity, but defendant refused to pay unless the bill were produced and delivered up to him. Littledale J. thought defendant warranted at law in that refusal, and he nonsuited plaintiff; and on rule nisi to enter verdict for plaintiff, and cause shown, and time to consider. The Court agreed with him: the acceptor when he pays has a right to the bill for his own security, and as a voucher against the drawer: if it be destroyed, he is still deprived of it as a voucher; and if it be lost only, some other person may make a claim upon him: and why is he, by the negligence of the loser, to be forced at his peril to prove what may be necessary to resist the claim? and how is he to be assured that the bill has been either lost or destroyed? The proper course is to offer an indemnity, and if that be refused, to apply for relief in a court of equity: a court of equity will enforce payment.

N. Glover v. Thomson, 1 Ryan & M. 403., which is contrary, was cited.

(86) *Mayor v. Johnson*, 3 Campb. 324. Plaintiff's traveller took a 5*l.* country bank-note, payable at Stamford or London, and cut it in halves, and sent the two halves to plaintiff; one half only arrived, the mail-bag containing the other was stolen: plaintiff sued on the half which arrived; but as plaintiff could not show that the other half was destroyed, Lord Ellenborough held the action could not be supported, and nonsuit.

N. He assigned as a reason, that the stolen half might immediately have got into the hands of a bona fide holder for value, and that such holder would have had as good a right as plaintiff: but, *quære*—whether a man who takes half a note does not take it at his peril?

A special count upon a bill or note states in their order all the facts necessary to maintain the action.

To give a full idea of this count, and open the way to the observations necessary to be made upon it, I shall insert a comprehensive one in *assumpsit* upon a foreign bill, which will sufficiently elucidate those on inland bills or notes, and those in debt.

Count in assumpsit upon a Foreign Bill.

London, } John Mills v. Thomas Roper and Ste-
to wit. } phen Howe. For that whereas on (1)
the 1st day of January, 1789, at (2) London afore-
said, in the parish of St. Mary le Bow, in the ward
of Cheap, certain persons (2^d) using the style and
firm of Gaunt and Co. according (3) to the usage
and custom of merchants, from time immemorial
used and approved of, made (4) their certain bill
of exchange in writing, their (5) copartnership, style,
and firm aforesaid, being thereunto subscribed, bear-
ing (6) date the day and year aforesaid, and (7)
directed to one Henry Hunt, at Venice, in Italy,
in parts beyond the seas, and (8) thereby re-
quested the said Henry, at double usance, to pay
in Venice (8^d) that their first of exchange (second
(9) and third of the same tenor not paid) to the
said (9^d) Thomas and Stephen, or (10) their order,
a certain sum of foreign money (10^d), called in the
said bill seven hundred ducats, value (10^d) received,
and then and there (10^d) delivered the said bill to
the said Thomas and Stephen, which (11) said bill

the said Henry Hunt, afterwards, to wit, on (12) the day and year aforesaid, at Venice, to wit, at London aforesaid, in the parish and ward aforesaid, on sight thereof, duly, according to the usage and custom of merchants, accepted, payable at A. B. and Co.'s Venice (12²); and the said Thomas and Stephen (12³) afterwards and before the payment of the said sum of money in the said bill mentioned, or of any part thereof, to wit, on the day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, by their certain indorsement in writing then and there made upon the said bill (12⁴), their proper hands being thereunto subscribed, according to the usage and custom of merchants, appointed the (13) contents of the said bill to be paid to one Peter White, or (14) his order, and then and there delivered the said bill so indorsed to the said Peter; and (15) the said Peter afterwards and before the payment of the said sum of money in the said bill mentioned, or of any part thereof, to wit, on the day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, by his certain indorsement in writing then and there made upon the said bill, his proper hand being thereunto subscribed, appointed the contents of the said bill to be paid to the said John, and then and there delivered the said bill so indorsed to the said John, of (16); which said indorsements the said Henry afterwards, to wit, on the day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, had notice; and

the said John in fact says, that (17) an usance mentioned in any bill of exchange drawn in London and payable in Venice, is and at the several times aforesaid was, three calendar months from the date of the said bill, and no other time whatever; and (18) that afterwards, and when the said bill had according to the tenor and effect thereof become payable, to wit, on (19) the 4th day of July, in the year aforesaid, at Venice aforesaid, to wit, at London aforesaid, in the parish and ward aforesaid, the said bill was duly, according to the usage and custom of merchants, and according to the tenor of the said acceptance thereof, shown and presented to the said Henry at A. B. and Co.'s aforesaid, at Venice aforesaid, for payment; and the said Henry was then and there requested to pay the said sum of money in the said bill mentioned; but the said Henry did not then (19²) or there pay the said sum of money in the said bill mentioned, or any part thereof, but wholly neglected and refused so to do; neither (20) did he pay the said second or third of exchange in the said bill mentioned, or either of them; nor (21) did the said person so using the style and firm of Gaunt and Co. pay the said sum of money in the said bill mentioned, or any part thereof, or the said second or third of exchange; and thereupon the said John, afterwards, to wit on the day and year last aforesaid, at Venice aforesaid, to wit, at London aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants, caused the said

bill to be protested (22) for non-payment; of all which premises the said Thomas and Stephen afterwards, to wit, on the day and year last aforesaid, at London aforesaid, in the parish and ward aforesaid, had (23) notice; and by reason thereof, and by force of the usage and custom of merchants, became liable to pay to (24) the said John the said sum of money in the said bill mentioned, or the value thereof, when (25) they the said Thomas and Stephen should be thereunto afterwards requested: and (26) being so liable, they the said Thomas and Stephen, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at London aforesaid, in the parish and ward aforesaid, undertook, and to the said John then and there faithfully promised, to pay to him the said sum of money in the said bill mentioned, or the value thereof, when they the said Thomas and Stephen should be thereunto afterwards requested: and (27) the said John avers, that the said 700 ducats in the said bill mentioned, on the day and year last aforesaid, were, and from thenceforth hitherto have been, and still are of great value, to wit, of the value of £. of lawful money of Great Britain, that is to say, at London aforesaid, in the parish and ward aforesaid; yet the said Thomas and Stephen (although often requested) have not nor hath either of them paid to the said John the said sum of money in the said bill mentioned, or any part thereof, or the value thereof, or of any part thereof, but have wholly neglected and refused,

and still neglect and refuse, so to do; wherefore the said John says he is injured, and hath sustained damage to the value of *l.*, and therefore he brings suit, &c.

1. "On," &c. Upon a bill or note importing to be payable within a limited time after the date, and dated on a particular day, the date here inserted (87) must be that day: on a bill or note importing to be payable within a limited time after the date, and not dated, the day (88) it issued, if it can be ascertained; otherwise, (89) the first day the plaintiff knew and can prove that it existed.

2. "At," &c. On a foreign bill the place here mentioned must be the place at which it bears date; but where the drawing of the bill must be proved upon a trial, some place in England or Wales should be subjoined under a *videlicet*, thus, "at Venice in Italy, to wit, at London," &c.

In an action against the drawer, the want of subjoining such place may be taken advantage of by special demurrer to the count; but by special demurrer (90) only.

(87) *Stafford v. Forcer*, 10 Mod. 511., cited Str. 22. In an action on a note dated in 1704, defendant pleaded that the cause of action did not accrue within six years; the plaintiff replied a bill filed in 1714, and that the cause of action accrued within six years of that time; and after verdict for the plaintiff the Court arrested the judgment, because it was stated that the note was made and dated in 1704, and then the cause of action must have accrued above six years before 1714.

(88) *Vide antè*, p. 248. n. (64).

(89) *Vide Beawcs*, § 190. p. 439.

(90) *Vide* 16 & 17 Car. 2. c. 8. § 1., 4 Ann. c. 16. § 1.

In an action on a foreign note, it may be stated to have been made at any place in England, without naming the foreign place. (91)

Inland bills and notes, though they may bear date at a particular place, may be alleged to have been made any where in England or Wales.

2^d. "Certain persons." A bill or note may be stated according to its legal operation.

Thus a joint or several note, or a note importing in the body of it to be made by several persons, but signed by one only (92), may be stated as a several note.

Nay, where the plaintiff, in an action against one of two makers of a joint or several note, stated, that the defendant and another made their certain note, &c. and thereby jointly or severally promised to pay, the Court held it (93) well after judgment

(91) *Houriet v. Morris*, 3 Campb. 303. In an action on a note dated at Paris, the statement was, that defendant at London, &c. made his note, &c.; it was urged that it should have been stated to have been made at Paris, to wit, at London, &c.; but Lord Ellenborough said the contract was transitory, and the statement sufficient.

(92) *Roberts v. Peake*, Burr. 322. A note signed by the defendant alone, but importing in the body of it to have been made by the defendant and another person, was declared upon as the several note of the defendant, and it was agreed that it might be declared upon according to its legal operation; but judgment was given for the defendant upon another ground. See *Siffkin v. Walker*, 2 Campb. N. P. C. 308.

(93) *Butler v. Malissy*, Str. 76. In an action on a note, the declaration stated that the defendant and another did jointly or severally promise to pay; and upon demurrer, the Court

by default; notwithstanding, as the truth of either member verifies a disjunctive proposition, the note might have been joint.

And in an (94) action against one of the several makers of a joint note, or one (95) of several drawers of a joint bill, if it be stated as a several one made by one alone, the objection can only be taken by plea in abatement.

held it bad, and the plaintiff obtained leave to discontinue. And in *Ovington v. Neale*, Str. 819., Lord Raym. 1544, the plaintiff declared upon a note by which the defendant and another jointly or severally promised to pay; and upon error, the Court of King's Bench held it bad, because the plaintiff had not shown a title to bring a separate action against the defendant, for he only says he has this or some other cause of action; and judgment for the plaintiff was reversed. However, in *Rees v. Abbott*, Cowp. 832, the declaration upon a note stated that the defendant and another made their note, by which they jointly or severally promised to pay; and upon error after judgment by default, *Butler v. Malissy*, and *Ovington v. Neale*, were cited as in point. Sed per Lord Mansfield, "If *or* is to be considered in this case as a disjunctive, the plaintiff is to elect, "and by the action he has made his election to consider the "note as several; but, in this case, it is synonymous to *and*, "and both and each promise to pay." Judgment affirmed.

(94) Per Buller J., *Rees v. Abbott*, *suprà*; and see *Rice v. Shute*, Burr. 2611., and *Abbot v. Smith*, Blackst. 947.

(95) *Evans v. Lewis*, E. 1794. cit. 1 B. & Ald. 226. In an action against defendant as drawer of a bill, the declaration stated that he made his certain bill of exchange, &c.; it appeared in evidence that the bill was drawn by defendant and another person jointly: the point was saved whether this was a variance, and the Court on motion were of opinion it was not, and that the only mode by which the defendant could have made the objection was by plea in abatement.

A bill or note made by a servant for his master may be stated to have been made by the master, because that (96) is its legal operation.

3. "According," &c. It is (97) not requisite to set out any part of the custom, and even a reference to it is (98) unnecessary.

In actions upon notes, instead of referring to the custom of merchants, the count refers to the statute, but this reference is unnecessary.

4. "Made." Where a man signs his name upon a blank paper stamped with a bill stamp, and delivers it to another to draw above the signature what bill he pleases thereon, and he draws one accordingly, the (99) bill may be stated to have been made by the person whose signature it bears.

(96) See *antè*, p. 379.

(97) *Soper v. Dible*, Lord Raym. 175. In an action upon a bill the defendant demurred, because the declaration did not set out the custom, the Court held it unnecessary, and said the better way was to omit it.

(98) This was determined in *Ereskin v. Murray*, *antè*, p. 38., on error after judgment by default; and see Lord Raym. 88., Carth. 83. 269, 270., Lutw. 279.

(99) *Collis v. Emett*, 1 H. Blackst. 313. Emett signed a piece of blank paper stamped with a bill stamp, and delivered it to Livesay and Co. that they might write above his signature such bill as they should please: they wrote one accordingly; and an action being brought thereon against Emett, in which it was stated that he drew the bill, the Court thought the statement proper; and upon a special verdict stating these facts the Court gave judgment for the plaintiff upon a count which alleged that the bill was drawn by the defendant. So *Cruchley v. Clarence*, *antè*, p. 36., and *Atwood, v. Griffin*, *antè*, p. 36.; see also *Russell v. Langstaff*, *antè*, p. 167.

5. "Their," &c. A signature, when essential, is (100) implied by the preceding word "made;" this allegation, therefore, is not strictly necessary, and had better be omitted, although a (101) variance in this particular would be of no importance.

6. "Bearing," &c. This allegation (102) also may be dispensed with; for it shall be intended, when the date is material, that a bill or note was dated when drawn.

Where the date is immaterial, and this allegation is omitted in the declaration, this intendment shall

(100) This was ruled upon demurrer in *Elliot v. Cooper*, antè, p. 38., and *Smith v. Jarves*, antè, p. 38.; and on error after judgment by default, in *Ereskin v. Murray*, antè, p. 38.

(101) *Jones and another v. Mars and another*, 2 Campb. N.P.C. 305. The declaration in an action against the drawers of a bill, stated it to have been made by the defendants, "their own proper *hands* being thereunto subscribed." The bill was in fact signed by only one of them, "Mars and Co." Lord Ellenborough doubted whether the variance was material; but refused to nonsuit the plaintiffs. He said had it been "their own proper *hand*," he should have held it clearly sufficient.

Booth v. Grove, 11 Moody & M. 182. Declaration that defendant made a note, "his own proper hand being thereunto subscribed:" it appeared the note was made by defendant's son under his authority: it was objected this was a variance, sed per Lord T., "I think certainly not. These words may be rejected as surplusage."

See also *Levy v. Wilson*, 5 Esp. N.P.C. 180., post, and *Helmsley v. Loader*, 2 Campb. N.P.C. 450., and *Heys v. Heseltine*, 2 Campb. 604.

(102) *De la Courtier v. Bellamy*, 2 Show. 422. In an action upon a foreign bill payable at double usance from the date thereof, the declaration stated that the drawer on such a day

(103) not operate so as to render a variance between the date of the bill and the day on which it is stated to have been drawn fatal.

7. "Directed," &c. In an action against the acceptor upon a bill directed to him, or, in his absence, to I. S., the (104) conditional direction to I. S. need not be stated.

So, in an action against the acceptor of a bill, though the bill were directed to him and another person, it may be described as directed to him, without naming the other person. (105)

In an action against an acceptor, if the bill were

drew the bill, but the date was not set forth. An exception was taken on this ground; but, by the whole Court, "It is well enough; we will intend it was dated when it was drawn:" judgment for the plaintiff. Same point ruled acc., *Hague v. French*, 3 Bos. & Pull. 173.

(103) *Coxon v. Lyon*, 2 Campb. N.P.C. 307. n. The declaration stated that the defendant, on the 3d of Feb. 1810, made his bill, requesting the drawee to pay on a particular day. The bill was in fact dated the 6th of Feb. 1810, but no date was stated in the declaration. Thompson B. held that the variance was immaterial.

(104) *Anon.* 12 Mod. 447. A bill directed "to A., or, in his absence, to B.," began thus: "Gentlemen, pray pay," &c. A. accepted it; and in an action against him on his acceptance, the declaration described the bill as directed to A., without any notice of B.; and Holt C. J. held it well.

(105) *Mountstephen v. Brooks*, 1 Barn. & Ald. 224. In an action against three as acceptors of a bill, the declaration stated that J. S. made his bill directed to defendants, and thereby requested them to pay, &c.: it appeared in evidence, that it was in fact directed to them and one Richard Smith, with whom they were in partnership, and that it was accepted by him and them. Lord Ellenborough thought this a variance,

not directed to him, it has been held to be a fatal variance to state that it was. (106)

But if the bill import to be payable at a particular house, and it be accepted by the person who lives there, it may be described as requesting that person to pay (107) :

And as directed to him ; for that is its legal operation.

If a bill be directed to Messrs. A., B. and Co., it is no variance, in setting out the bill according to its tenor, to put *Mess^r. A., B. and Co.*, without the *r*, instead of *Mess^{rs}.* with it. (108)

and nonsuited the plaintiff ; but on an application for a new trial, he changed his opinion ; and the rest of the Court concurring with him, a new trial was granted.

(106) *Gray v. Milner*, 2 Stark. 336. In an action against the acceptor of a bill, the declaration stated that the bill was directed to the defendant : it appeared to have no direction. Lord Ellenborough held this a fatal misdescription, and nonsuited the plaintiff.

(107) *Gray v. Milner*, 8 Taunt. 739. In an action against defendant as acceptor of a bill, the declaration stated that W. S. made his bill, and thereby requested defendant to pay, and that he accepted it ; the instrument imported to be an order to pay, but instead of the usual address to a drawee, had these words, " payable at No. 1 Wilmot Street, opposite the Lamb, Bethnal Green, London." Defendant, who lived there, accepted it. On point saved and time to consider, the Court held that directing it to a particular house must mean to some person who resided there, and defendant, by accepting it, acknowledged that he was the person to whom it was directed ; and plaintiff had judgment.

(108) *Rex v. Oldfield*, Mich. 1815. An indictment for forging an indorsement upon a bill imported to set out the bill according to its tenor ; the bill was directed to " *Mess^{rs}. Master-*

8. "In Venice." If a bill or note, in what is strictly part of it, fix a specific place for payment, it is a fatal variance to omit stating it in setting out the bill or note. (109)

Unless the objection be remedied by 1 & 2 Geo. 4. c. 78. (110)

On the other hand, if it be stated as the import of the bill or note that the money should be paid at a specific place, when the provision for that purpose is not strictly part of the bill or note, it is a fatal variance. (111)

man and Co.;" but upon the indictment the *r* in Messrs. was omitted, and it stood Mess^{rs}; the point was saved for the consideration of the twelve judges, and they were unanimous that as it appeared by the context that Mess^{rs} must mean Mess^{rs}, the variance was immaterial, and the conviction unobjectionable.

(109) *Roehe v. Campbell*, 3 Campb. 247. A note was in this form, "31 days after date I promise to pay J. S. or order, at the house of N., No. 6. Grafton-street, Dublin, 40*l*." &c. In an action by indorsee against indorser, the bill was described generally to pay J. S. or order, without naming the place: and it was urged that this was a misdescription, for it implied that the note was payable generally, while it was only payable at one given house. Lord Ellenborough thought it a fatal misdescription, and nonsuited plaintiff.

Hodge v. Fillis, 3 Campb. 463. A bill was addressed to Messrs. Fillis and Co., Plymouth, "payable in London;" they accepted it, payable at Sir John Perring and Co.'s, London. In an action against them, the first count, in stating the bill, omitted to allege that the address made it payable in London. Lord Ellenborough thought the omission fatal on that count; but on proof of a promise by defendants to pay after the bill was due, he thought the plaintiff entitled to recover on other counts; and verdict accordingly.

(110) Vide *antè*, p. 200. 222, 223.

(111) *Exon v. Russell*, 4 Maule and Selw. 505. At the bot-

In such case, however, stating that the party made the bill or note, and that he *then and there* made it payable at the specified place, without stating that he *thereby* made it so payable, is not fatal. (112)

9. "Second," &c. In an action upon a bill consisting of several parts, if the plaintiff has each part, it may be doubted whether he need take notice of this condition, because all the parts collectively make an unconditional bill; and where he has not each part, it should seem more correct to state that the drawer made his certain bill of exchange in writing in three parts, and by each of the said parts requested, &c.; but the form I have adopted is the usual one.

tom of a note was written, "at Messrs. Brown and Co.'s, "bankers, London:" in stating the note, the declaration alleged that defendant made the note, and thereby promised to pay, &c. and made the same payable, and to be paid according to the tenor and effect, at the house of persons described as Messrs. Brown and Co., bankers, London. On rule nisi for a nonsuit upon another ground, the Court thought it a misdescription of the note to state as its import that it was made payable at a particular place; for as the place was mentioned by way of memorandum only, and not as part of the contract, that was not its import; and on that ground the rule for a nonsuit was made absolute.

(112) *Hardy v. Woodroffe*, 2 Stark. 319. In an action against the maker of a note, it was alleged in the declaration that defendant made the note, &c. and that he then and there made it payable at No. 32, Castle-street, Holborn; the defendant had written upon the note "payable at No. 32, Castle-street, Holborn," and Abbott J. held that that memorandum supported the statement in the declaration; and plaintiff had a verdict.

9². "To the said Thomas and Stephen." A bill or note importing to be payable to a fictitious person, and to be indorsed by him, may be stated to be payable to the person in whose favour the indorsement is made, or, if it import to be indorsed in blank, it may be stated to be payable to (113) bearer.

A bill or note intended to have been made payable to A. that he might guarantee the payment to B., but, through ignorance or mistake, made payable to B. and by him indorsed to A., and then indorsed back by A. to B., may, perhaps (114), be stated to have been made payable to A.

The payee of a bill or note payable "to his

(113) Vide *antè*, p. 31. n. (71). In *Vere v. Lewis*, *antè*, p. 33. Lord Kenyon, Ashhurst and Buller Js., thought that the plaintiff might recover on the count which stated that the bill was drawn payable to bearer; and in *Collis v. Emett*, *antè*, p. 34. n. (72), it was so decided.

(114) *Bishop v. Hayward*, 4. Term Rep. 470. A note payable to the plaintiff or order was indorsed by him to the defendant, and indorsed back again by the defendant to him; these facts being stated on the declaration, the Court arrested the judgment. It was suggested in the argument that the plaintiff had refused to take the note, unless the defendant put his name upon it, and that as he was made payee, his indorsement was mere form; and per Lord Kenyon, "Had it been understood by all parties that the note, though nominally payable to the plaintiff, was substantially to be paid to the defendant, it should have been declared on according to its legal import, as was held in *Minet v. Gibson*; a name may be omitted in the declaration, if the legal operation of the instrument requires it." Vide *antè*, p. 329. 330, 331.

order," may (115) state it to have been made payable to himself.

If the intended payee's name be miswritten, so as to give it a different sound and make it a different name, it may be stated to have been made payable to the person intended, and evidence may be given to show who was intended. (116)

10. "Or order," &c. In an action by the assignee of a bill or note, it is necessary to show that the bill or note authorizes a transfer; in an action by the payee (117), it is not.

10². "Money." If a bill or note be for money of the same appellation as ours, but of different value, it must not be stated as if it were for our money (118);

(115) *Frederick v. Cotton*, 2 Show. 8. In an action against the acceptor of a bill, it was objected, in arrest of judgment, that the bill was stated to be payable to the order of the plaintiff, and no order was alleged; but the Court resolved without any difficulty, that money to be paid to a man's order was due to himself; and judgment was given for the plaintiff.

(116) *Willis v. Barrett*, 2 Stark. 29. E. Willis sued as payee of a note; the note, when produced, imported to be payable to E. Willison, but Lord Ellenborough allowed evidence to prove that plaintiff was the person meant; and he had a verdict.

(117) See *antè*, p. 34. note (73).

Moore v. Paine, Ann. 288. In error upon a judgment by default in an action upon a note, it was objected that it was only stated to be payable to the plaintiff, and not *to his order*; but by Lord Hardwicke, "that has been overruled often:" the judgment was affirmed.

(118) *Kearney v. King*, 2 B. and Ald. 301. In an action against the acceptor, the declaration stated that A. B. at Dublin, to wit, at London, drew a bill on defendant requiring him to pay

As if it be for so many pounds, and be drawn and payable in Ireland, it must not be stated to be for so many pounds generally, without something to show that pounds Irish were meant. (118)

10³. "Value received." It is not necessary to state that a bill or note was for value received.

But, if it be so stated, and the statement give a wrong meaning to those words, it may be a fatal misdescription. (119)

the sum of 542*l.* 1*s.* 8*d.* The bill, when produced, appeared to be drawn in Ireland, and to be payable in Ireland, and though it was for 542*l.* 1*s.* 8*d.* sterling, that sum Irish was only equal to 500*l.* 7*s.* 9*d.* English; and on rule nisi for a nonsuit, and cause shown, the Court were clear that the bill, as stated, must be taken to have been for English money; and the bill produced being for Irish, there was a clear variance; and the rule was made absolute.

Sprowle v. Legge, 6 B. and Ald. 16. The declaration stated that defendant, at Dublin, to wit, at London, made his promissory note, and thereby promised to pay at No. 81, Dame-street, Dublin, 171*l.* 17*s.* 6*d.* sterling; it appeared in evidence that the note was made at Dublin in Ireland, and that in Ireland, Irish currency is called sterling. Abbott C. J. directed verdict for defendant with liberty to plaintiff to move, motion accordingly; but the Court thought that in an English court, if the instrument, which was stated according to its legal effect, were described as containing a promise to pay a sum generally in pounds, shillings, and pence, English money must be understood; and that if the instrument really were for payment in other money, it was a fatal variance. Rule refused.

(119) *Higmore v. Primrose*, 5 Maule and Selw. 65. A bill payable to the drawer's order was for value received generally; the declaration stated that it was for value received by the drawer. The Court thought that value received by the drawer could be no foundation for his drawing to his own order, and

Upon a bill payable to the drawer's order, if the bill be for value received generally, without saying by whom, it is giving them a wrong meaning to state it as for value received by the drawer. (119)

If the bill be payable to a third person, it is not. (120)

10⁴. "Delivered," &c. It is (121) not necessary to state that the drawer of a bill "delivered" it to the payee; it is implied in the allegation that he "made" the bill.

considered this a variance; but there being an acknowledgment of the debt by the defendant, the plaintiff recovered on the account stated.

(120) *Grant v. Da Costa*, 3 M. and Selw. 351. In an action against the acceptor on a bill payable to J. S. or order, it was stated to be for value received by the drawer; on production, it appeared to be for value received generally: and on a rule nisi for a nonsuit, on the ground "that the value received" must mean "received of the drawee," the Court held that the meaning of value received on such a bill, payable to a third person, was, that the value had been received by the drawer from the payee; that it was natural the drawer should give the drawee that information; but why should he tell him that he, the drawee, had had value from the drawer? Rule discharged.

(121) *Churchill v. Gardner*, 7 Term Rep. 596. In an action by the payee of a bill against the acceptor, the declaration stated that the drawer made his certain bill of exchange, but there was no allegation that he delivered it to the plaintiff, and the defendant demurred specially for that cause: but the Court was clearly of opinion that there was no foundation for the objection; the delivery of the bill to the plaintiff being sufficiently implied in the allegation that the drawer "made" the bill.

If it be stated that the bill was delivered to the drawee, and that he accepted it, it is (122) not necessary to allege that he delivered it back.

11. "Which," &c. Except in actions against acceptors, or on bills payable within a limited time after sight, the acceptance need not be stated. If stated though unnecessarily, it was once held at nisi prius that it (123) must be proved.

But the contrary has since been determined by the Court of King's Bench. (124)

(122) *Smith v. M'Clure*, 5 East. Rep. 476. The plaintiff declared on a bill payable to his own order, and averred that he delivered it to the defendant, to whom it was addressed, and that he accepted it according to the custom of merchants, by reason of which premises, &c. the defendant became liable to pay. The defendant demurred specially because it was not alleged that the defendant delivered back the bill: sed per Lord Ellenborough, "the acceptance must be considered as perfect; and if so, it gave the plaintiff a right to sue upon it: if, after the acceptance, the defendant improperly detained the bill, the plaintiff might nevertheless sue him upon it." Judgment for the plaintiff.

(123) *Jones v. Morgan and another*, 2 Campb. 474. In an action on a bill, drawn on Burt by the defendants, payable to their own order, and indorsed by them to the plaintiff, the declaration unnecessarily stated an acceptance by Burt. And Lord Ellenborough was of opinion, that the plaintiff, having stated an acceptance, was bound to prove it.

(124) *Tanner v. Bean*, 4 B. and Cr. 312. In assumpsit against indorser, on a bill payable after date, the declaration stated that the drawee accepted it. Plaintiff did not prove the acceptance at the trial, and Littledale J. thought it unnecessary, but he saved the point: on motion for a nonsuit, the Court were clear the proof was not requisite: the allegation of an acceptance was not in the nature of a description of the instrument;

12: "On," &c. Where the time when a bill or note is payable depends on the presentment for acceptance, and the action is against the drawer of a bill, or the indorser of a bill or note, this should be the very day of the presentment; in other cases, exactness as to the day is not requisite.

If, however, the plaintiff allege in terms that the acceptance was made before the time limited by a bill for its payment, it has been laid down that he will (125) be precluded from giving in evidence an acceptance afterwards; but this may, perhaps, be doubted. (126)

Though the time when a bill or note is payable depend upon the presentment for acceptance, as where it imports to be payable at a given time after sight; if the action be against the acceptor, or maker, exactness as to stating the day of presentment is not essential. (127)

acceptance did not vary the responsibility of the indorser in case of nonpayment, and the averment therefore was immaterial. Rule to show cause refused.

(125) *Jackson v. Pigott*, Lord Raym. 364, 12 Mod. 212. In an action against the acceptor of a bill, per Holt C. J.:—"If the plaintiff declares that the acceptance was before the day appointed for the payment, and that the defendant accepted to pay according to the tenor and effect of the bill, and it appears upon the evidence that the acceptance in fact was after the day of payment, this would be against the plaintiff."

(126) See *Young v. Wright*, post. p. 394. n. and *Peppins v. Solomons*, 5 T.R. 496.

(127) *Forman v. Jacob*, 1 Stark. 46. Indorsee against acceptor on bill dated Constantinople, and payable fifty days after

12^d. "At A. B. and Co.'s." Though an acceptance import to make the bill payable at a banker's or any other particular place, this need not be stated in an action against the acceptor, nor, perhaps, in an action against the drawer or an indorser, unless the acceptance is prior to the 1st of August, 1821, or unless it express that the party accepts the bill payable there, "and not otherwise or elsewhere." (128)

If it be expressed in the acceptance that the bill is to be payable there "and not otherwise or elsewhere" (128), or if the acceptance be prior to 31st August, 1821, the acceptance must be stated as a special acceptance, to pay at such place. (129)

12^d. "Afterwards," &c. It is (130) not a material variance, that an indorsement is stated to

sight. The declaration averred an acceptance on the day the bill bore date, whereas the acceptance was not till five weeks afterwards: it was objected that this was a fatal variance; but Lord Ellenborough held otherwise, and plaintiff had a verdict.

N. The date was 11th August; the acceptance, 19th September.

(128) See 1 & 2 G. 4. c. 78. § 1. *antè*, p. 200.

(129) See *Rowe v. Young*, 2 Brod. & Bing. 165.

(130) *Young and another v. Wright*. 1 Campb. N. P. C. 139. Action by indorsees against the drawer of a bill. The declaration stated all the indorsements to have been made before the bill became due; but it appeared that the immediate indorsement to the plaintiffs had been made after the bill had become due. Lord Ellenborough, on the authority of *Russell v. Langstaffe*, Dougl. 514. (*antè*, p. 167.), held that the variance was immaterial; he said that this was the converse of that case, but was to be governed by the same principle.

have been made before, and is proved to have been made after, the bill became due.

12^a. "Their proper hands." This is an unnecessary allegation, being implied in the preceding words; it is better to omit it, because, although it would probably be held to be surplusage (131), there are cases (132) in which it might occasion questions and delay.

13. "The contents." On an indorsement for less than the full sum mentioned in the bill or note, the plaintiff must (133) show that the residue was paid.

14. "Or his order." These (134) words are unnecessary.

A full and a blank indorsement are stated in the same manner.

15. "And the said Peter," &c. Every indorse-

(131) *Booth v. Grove*, *antè*, p. 383. n.

(132) *Levy v. Wilson*, 5 Esp. N.P.C. 180. In an action by an indorsee of a bill, the declaration stated the indorsement to have been made by the payee "his own hand-writing being threunto subscribed." The bill appeared to have been indorsed by procuration. Lord Ellenborough held this variance fatal, and nonsuited the plaintiff. See also *Jones v. Mars*, *antè*, p. 383., *sed vide Booth v. Grove*, *ibid*.

(133) *Hawkins v. Gardner*, 12 Mod. 213. The declaration stated that the defendant drew a bill for 46*l.* 19*s.* payable to Blackman or order, and that Blackman indorsed 43*l.* 4*s.* thereof to the plaintiff; the Court held, that an indorsement for part only of what was due upon the bill was bad, and said, if Blackman had brought an action for part, he must have acknowledged satisfaction for the residuc.

(134) *Vide antè*, p. 128.

ment essential to a transfer must be stated; unnecessary ones may (135) be omitted.

Where the plaintiff would omit an indorsement, he should represent that which precedes the indorsement to be omitted to have been made in favour of the person who is indorsee upon that which follows.

Thus, if a bill payable to A.'s order be indorsed by him in blank, and delivered to B. and indorsed by B. to C., if C. would omit stating B.'s indorsement, he should state that A. indorsed it immediately to him, C.

16. "Of which," &c. This (136) allegation is unnecessary.

(135) In *Peacock v. Rhodes*, *antè*, p. 123. note (12), the bill was payable to Ingham, and indorsed by him and by John Daltry; the plaintiff declared as indorsee of Ingham, and recovered.

Chaters v. Bell and others. 4 Esp. N.P.C. 120. The declaration stated, that a bill was drawn payable to Curry, by him indorsed to the defendant, and by the defendant to the plaintiff. There were, in fact, several intermediate indorsements between Curry and the defendant, which were omitted in the declaration; and it was contended that the plaintiff should have either declared, as the immediate indorsee of the payee, or have stated all the indorsements. But Lord Ellenborough overruled the objection. Vide *Waynam v. Bend*, and *Critchlow v. Parry*, *post*.

(136) *Anon. Pract. Reg.* 358. In an action by an indorsee of a note against the maker, the defendant demurred, and showed for cause, that it was not alleged that he had notice of the indorsement; but by the Court, "there is no need of 'notice.'" Judgment for the plaintiff.

Reynolds v. Davies, in error, 1 Bos. and Pull. 625. In an

17. "That an usance," &c. A neglect to show the duration of an usance is (137) fatal upon demurrer, (unless, perhaps, where it is alleged that the bill was presented on the day it was payable,) but upon demurrer only. (138)

action by an indorsee against the maker of a note, the declaration stated the indorsement and delivery by the payee, and then averred (in the usual form) the defendant's liability and promise to pay to the plaintiff. There was no averment of notice of such indorsement. The defendant demurred specially, but did not assign such want of notice as a cause of demurrer. After judgment in the King's Bench for the plaintiff Davies, a writ of error was brought in the exchequer chamber, and such want of notice assigned as error. But Eyre C. J. said, "the promise to pay contained in this note is to the payee or his order; immediately then on the order being made to the indorsee, the promise attaches: nor can we add the qualification of notice to a promise which was not originally qualified with that circumstance." Judgment affirmed.

(137) *Buckley v. Campbell*, Salk. 131. The plaintiff declared upon a bill drawn at Amsterdam and payable in London, at two usances, and did not show what the two usances were: and the Court gave judgment for the defendant; because, they could not take notice of foreign usances, which are longer in one place than another.

(138) *Smart v. Dean*, 3 Keb. 645. In an action on a bill from Paris, payable here at double usance, the defendant pleaded payment; and on issue taken thereon, demurred, and objected that it was not alleged that double usance was two months: sed non allocatur, "It being a known term among merchants, that usance is a month, double two months; and being averred he had not paid in two months, it is well enough, the defendant having waived advantage hereof by pleading payment:" but by Twysden J., "had it been on demurrer to the declaration, the plaintiff should have averred a particular custom that usance signifieth a month." Judgment for the plaintiff.

18. "The allegation of presentment." In an action against the maker of a note or the acceptor of a bill, the presentment is never stated, unless the bill or note is made payable, either by the original frame of it, or by the form of the acceptance, at a particular place only.

In an action against the drawer of a bill, or the indorser of a bill or note, it is essential to state, either, that (139) the bill or note was presented,

(139) *Mercer v. Southwell*, 2 Show. 180. The declaration against the drawer of a bill stated that the drawee did not accept, but did not allege that the bill had been shown or tendered to him; and upon demurrer on this account, the omission was held fatal; for, otherwise, it would be in the plaintiff's power to charge the drawer, when perhaps the drawee was ready to pay the money according to the tenor of the bill, if it had been tendered to him.

Rushton v. Aspinall, Dougl. 654.—680. In an action by indorsee against indorser upon a bill payable three months after date, the declaration stated that the bill, after the making thereof, to wit, on the same day and year aforesaid (referring to the day the bill bore date), was presented for acceptance, and accepted; yet the drawer, although afterwards, to wit, on the same day and year aforesaid, requested, did not pay; of which the drawer, the payee, and first indorser, and the acceptor, had notice: by reason whereof defendant became liable to pay; and being so liable, on the same day and year promised to pay. After verdict and judgment for plaintiff, the Court of King's Bench, upon a writ of error brought, held the declaration bad; because, it did not show that payment was demanded of the acceptor when the bill became due, or that notice was given to the defendant of his refusal to pay; and that though it was stated that he had promised to pay, that promise was stated as an inference of law, and the declaration did not contain premises from which that inference could be drawn; and

that the drawee or maker could not be found, or that the defendant, had he paid the bill, would have had no remedy against them.

If a bill be stated to have been accepted payable by certain persons at a particular place, so as to make presentment at that place essential, an averment in an action against the drawer of a presentment to those persons generally, without saying at that place, is insufficient.

But an allegation that it was presented to them "according to the tenor and effect of the bill, and the acceptance thereof," will (140) be sufficient.

Upon an acceptance making a bill payable at a particular house, it is sufficient to aver that it was presented at that house, and that the persons of that house were requested to pay it. (141)

the judgment was reversed. See also *Parker v. Gordon*, ante, p. 224., and *Ambrose v. Hopwood*, ante, p. 220.

(140) *Huffam v. Ellis*, M. 51 G.3. In an action against the drawers of a bill, the bill was stated in the declaration to have been accepted by Robertson, payable at the house of Kensington, Styan, and Adams, and a presentment to them was averred to have been made "according to the tenor and effect of the said bill, and the said acceptance thereof," without saying *at the house*: to this the defendant pleaded a judgment recovered, and judgment was given by the Court of King's Bench for the plaintiff, the defendants having failed to produce the record of the judgment pleaded. On error to the House of Lords, the want of an averment of a presentment at the *place* where it was made payable was assigned for error; and *Ambrose v. Hopwood* was cited: but the House of Lords affirmed the judgment of the Court of King's Bench. 10th of April, 1811.

(141) *Hawkey v. Borwick*, 4 Bingh. 135. In an action by

It is not necessary to state more particularly to whom it was presented there. (141)

Whether the action be against indorser (141), drawer (142), or acceptor.

* If the acceptance make the bill payable at the house of A., an averment that it was presented to A., according to the tenor and effect of the bill and acceptance, is sufficient; it implies that it was presented at A.'s house, for a presentment elsewhere would not be according to the tenor of the acceptance. (143)

indorsee against indorser, it was alleged that the drawee accepted the bill payable at Messrs. Smith, Payne, and Smith's, London, and that when it became due it was presented at the house of Messrs. Smith, Payne, and Smith, who then and there had notice of the several indorsements on the bill, and were requested to pay it, but refused. After verdict for plaintiff, it was assigned for error, that it was not averred that the bill was presented to the drawee, or to Smith, Payne, and Smith: but the Court of Exchequer Chamber held the allegation sufficient, and the judgment was affirmed.

(142) *De Bergareche v. Pillin*, 3 Bingh. 476. In an action against the drawer of a bill, it was alleged that the drawee accepted it payable at Sykes, Snaith, and Co.'s, and that, when it became due, it was duly presented and shown to and at the said Sykes, Snaith, and Co.'s for payment, and payment thereof was then and there required; but the said Sykes, Snaith, and Co. did not pay the sum mentioned in the bill nor any part thereof, nor did the acceptor. Special demurrer on the ground that presentment to the acceptor should have been averred; for, as 1 & 2 G. 4. c. 77. made this a general acceptance, there ought to be the same averments as would be required upon a general acceptance: but on argument, the Court thought the averment sufficient, and plaintiff had judgment.

(143) *Bush v. Kinnear*, 6 Maule and S. 210. In an action

If the drawee or maker cannot be found, it is (144) sufficient to aver generally that he was not found, without stating that any inquiry was made for him.

On an allegation that the bill or note was presented, and acceptance or payment refused, the plaintiff cannot (145) give in evidence that the drawee or maker could not be found.

by indorsee against indorser, the declaration stated that A. B. the drawee, accepted the bill, and by that acceptance appointed the money to be paid at the house of certain persons using the name, &c. of Messrs. Glyn, Mills and Co.; the averment of presentment was, that it was in due manner shown and presented to Messrs. Glyn, Mills and Co., and also to the said A. B. for payment, and they and he were then and there required to pay the same to plaintiff, according to the tenor and effect of the said bill and acceptance thereof and the said indorsement. Special demurrer, on the ground that it was not alleged to have been presented at the house of Glyn, Mills and Co.; but, on argument, the Court held that the averment implied that it was presented according to the tenor of the acceptance, and no presentment but one at the house of Glyn, Mills and Co. would have been according to the acceptance. Judgment for plaintiff.

(144) *Starke v. Cheeseman*, Carth. 509. In an action upon a bill drawn by the defendant on C. C. of Radcliffe, London, the declaration merely stated that the said C. C. at Radcliffe aforesaid, or elsewhere within the kingdom of England, was not found; and, after judgment by default, it was objected in arrest of final judgment, that it was not shown that any inquiry had been made after him; but it was answered, that it was according to the custom among merchants, and the common form in the like cases, and judgment was given for the plaintiff.

(145) *R. Leeson v. Pigott*, sittings after Trinity, 1788; and see *Smith v. Bellamy*, 2 Stark. 223.

But if a note be made payable at a particular town, in which the maker has no residence, a presentment at the banking houses there will justify and support an allegation that it was presented there to the maker. (146)

If the allegation be that the bill was presented by one J. S., that part of the allegation which states that the presentment was by J. S. is immaterial. (147)

In an action against the acceptor of a bill or maker of a note payable on demand, a (148) presentment or demand need not be stated.

19. "On, &c." Unless there be an express averment that the presentment was made on the

(146) *Hardy v. Woodroffe*, 2 Stark. 319. Action against the maker of a note made payable at Guilford, and allegation that plaintiff showed and presented the note to defendant at Guilford for payment thereof: plaintiff proved that he presented the note at two banks at Guilford, and that defendant lived in London: it was objected that this proof did not support the allegation; but Abbott J. thought otherwise, and that a presentment at Guilford, defendant not being there, was a presentment to defendant: verdict for plaintiff.

(147) *Boehm v. Campbell*, Gow. 55. In an action by drawer against guarantee of acceptor, averment that the bill was presented for payment by one J. S. at the place where the acceptance made it payable: plaintiff proved a presentment there, but not by J. S.; and Dallas C. J. held the substantive part of the allegation proved, and plaintiff had a verdict.

(148) *Rumball v. Ball*, 10 Mod. 38. Debt upon a note, by which the defendant acknowledged himself indebted, and promised to pay on demand: it was urged, in arrest of judgment, that it was not alleged that there had been a demand; but the Court held the allegation unnecessary.

day when the bill or note became payable, this (149) must be that very day; where there is such averment, exactness as to the day is, probably, immaterial.

In an action against the acceptor of a bill payable a limited time after sight, if the declaration allege a presentment for payment, a mistake in the day on which such presentment was made is immaterial. (150)

Especially if it be alleged that it was presented when it became due and payable, and it was in fact presented on the day it became due. (150)

19². "Did not, &c." In an action against the maker upon a note payable at the house of a third person, if a presentment there be stated, it is not necessary to state a special refusal there: the general allegation at the end of the declaration, that defendant did not pay, will be sufficient; for payment at that house would have been payment by him, and it would not be true that he had not paid, had there been a payment there. (151)

(149) See *Rushton v. Aspinall*, ant^o p. 398.

(150) *Forman v. Jacob*, 1 Stark. 46. In an action by indorsee against acceptor on a bill payable fifty days after sight, the declaration alleged an acceptance 11th August, and that when the bill became due and payable, viz. on 3d of October, it was presented for payment. It appeared in evidence that the acceptance was not till the 19th of September, nor the presentment for payment till the 11th of November; and it was urged that these mistakes were fatal: Lord Ellenborough thought not, and the plaintiff had a verdict.

(151) *Butterworth v. Lord Le Despencer*, 3 Maule & Sel. 150.

If a bill require a man to pay at a given place, it is a sufficient breach as against him that *he* did not pay there: it is not necessary to allege that no one else did. (152)

20. "Neither," &c. Where the plaintiff states that the sum of money mentioned in the bill was not paid, this allegation is not (153) necessary.

Payee against maker on note payable at the house of Wright and Co. A presentment at Wright and Co.'s was stated, and it was alleged at the end of the declaration that the defendant, although often requested, had not paid, &c.; but there was no special allegation of non-payment upon the presentment at Wright and Co.'s. Defendant demurred on this ground; but, on argument, the Court was clear that the general allegation of non-payment sufficiently negatived any payment at Wright and Co.'s, and judgment was given for the plaintiff.

(151) *Giles v. Bourne*, 6 Maule & Sel. 73. In assumpsit by indorsee of a bill against the acceptor, the declaration stated that on the 22d of February 1816, J. T. made his bill of exchange, directed to defendant, and required defendant, four months after the date of the bill, to pay him or his order at Messrs. Veres and Co.'s, Lombard Street, 940^l, which bill defendant accepted; and that at the expiration of the time appointed by the bill for payment thereof, viz. on 25th of June, the bill was presented by defendant at Messrs. Veres and Co.'s, Lombard Street, for payment, and plaintiffs required him to pay, but he did not. Demurrer, because it was not alleged what date the bill bore, or that no other person paid it at Veres and Co.'s; but the Court said, it must be intended the bill was dated the day it was alleged to have been made, and that defendant's promise was, that *he* would pay at Veres', and that he had refused.

(153) *Starke v. Cheeseman*, Carth. 509. The declaration stated that the defendant made three bills of exchange, all of the same date and contents, and by the second required the drawee (the first and third of the said bills not being paid) to pay, &c.; that

21. "Nor, &c." This (154) allegation is unnecessary.

22. "Protested, &c." The protest (155) need not be stated in an action on an inland bill; in an action on a foreign one, the plaintiff (156) must

the drawee was not to be found, and the said sum of money in the said bill mentioned was not paid: after judgment by default, it was objected in arrest of judgment, that there was no averment that the first and third bills were not paid; but it was answered that the allegation *that the money in the said bill mentioned* was not paid supplied the want of the averment, because the sum was the same in all the bills; and the plaintiff had judgment.

East v. Essington, Lord Raym. 810. Salk. 130. Assumpsit against the acceptor of the following bill, "Pray, pay this my first bill of exchange, the second and third not being paid." After verdict for the plaintiff, it was moved in arrest of judgment, because there was no averment, that the second and third were not paid: sed non allocatur; for per curiam, "though it had been ill upon demurrer, yet it is aided by the verdict; for, if the second or third had been paid, the jury would have found non-assumpsit."

Wegersloff v. Keene, Str. 214. In assumpsit against the acceptor upon a bill by which the drawer requested him to pay "that his first bill (his second not being paid)" the declaration stated that the defendant promised to pay the money, but had not paid it; the defendant pleaded an insufficient plea, and upon demurrer to the replication, objected that there was no averment that the second bill was not paid; but the objection was overruled, and judgment given for the plaintiff.

(154) Vide post, c. 11.

(155) See *Brough v. Parkins*, antè, p. 263.

(156) *Salomons v. Stavelly*, cited Dougl. 2d ed. 684. n. 144. The Court held, on the authority of the precedent in *Dunstar v. Pierce*, Lill. Ent. 55, that the neglect to allege a protest, in an action on a foreign bill, was matter of form only, and could not be taken advantage of on a general demurrer.

either state it, or (157) show that it was not necessary; but the omission can (158) only be taken advantage of by a special demurrer.

In stating the protest, if the plaintiff allege, "that (159) he protested the bill or caused it to be " protested," it will be unobjectionable, if the defendant plead over.

23. " Notice." If the defendant be *primâ facie* entitled to notice, it is essentially necessary to state that he had (160) notice, or to show that he was not entitled thereto.

Under an allegation of notice, it may be questionable whether evidence can be given of what would excuse notice (161), or whether to let in

(157) In *Rogers v. Stephens*, *suprà*, p. 291. note (137). Lord Kenyon, and afterwards the Court, held a protest for non-acceptance not necessary to support an action against the drawer, because it appeared he had no effects in the hands of the drawee. See *Legge v. Thorpe*, *antè*, p. 295.

(158) *Vide suprà*, note (156).

(159) *Witherby v. Sarsfield*, 1 Show. 125. The declaration upon a foreign bill stated that the plaintiff " protested it, or " caused it to be protested;" the defendant pleaded that he was not a merchant, and upon demurrer had judgment. A writ of error was brought; and it was then, for the first time, urged that the allegation that the plaintiff protested the bill or caused it to be protested, was uncertain; but the Court thought it well enough, reversed the judgment below, and then judgment was given for the plaintiff.

(160) See *Rushton v. Aspinall*, *antè*, p. 398. See the form of averring that the drawer of a bill had no effects in the hands of the drawee, in *Legge v. Thorpe*, 12 East. Rep. 171.

(161) *Corey v. Scott*, B. R. Tr. 1 Geo. 4. 3 B. & Ald. 619. In an action by indorsee against drawer, the declaration stated

such evidence, the facts to excuse notice should not be pleaded specially. (161)

But where notice is in fact given, though later than the ordinary time, and there are circumstances to make such notice sufficient, this is the proper allegation. (162)

24. "To the said John." In an action upon a bill or note stated upon the count to be payable to the order of the plaintiff, it is sometimes (163) usual, though (164) unnecessary, to insert here an

presentment for payment and dishonour, whereof drawer afterwards, &c. had notice: at the trial there was no evidence of notice, but plaintiff proved that defendant had no effects in the acceptor's hands: defendant rebutted this proof by showing that he and the acceptor only lent their names to a subsequent indorser. Under these circumstances Abbott C. J. held notice necessary; because, defendant on paying the bill, would have been entitled to sue such subsequent indorser, and, as he thought, the acceptor also. Plaintiff was nonsuited, with leave to move to enter a verdict: rule nisi accordingly. On cause shown, it was urged that under the allegation of notice plaintiff had no right to give evidence of what went only to excuse want of notice, and of that opinion were Bayley and Holroyd Js.; but on the merits, they agreed with Abbott C. J., that defendant was entitled to notice; and the rule was discharged. See 12 East. 171.

(162) *Firth v. Thrush*, 8 Barn. & Cr. 387. In an action against an indorser on a bill due 4th of August, the allegation of notice was in the usual form: it appeared he had no notice till 19th of October, but the delay was satisfactorily accounted for; it was insisted that the circumstances to account for the delay should have been stated, and that the ordinary allegation of notice was not sufficient; but the Court thought otherwise, and plaintiff recovered.

(163) It was done in *Fisher v. Pomfret*, Carth. 403.

(164) Vide *Frederick v. Cotton*, antè, p. 389.

allegation that the plaintiff made no order; but the better way, upon a bill or note made so payable, is, to state, according to the legal operation, that it was made payable "to the plaintiff," and then this allegation would be impertinent.

25. "When, &c." In an action against the acceptor of a bill or maker of a note not payable immediately upon presentment, instead of alleging that the defendant became liable, and promised to pay "when he should be thereunto afterwards requested," he is stated to have become liable, and to have promised to pay "according to the tenor and effect of the bill and acceptance" in the one case, and "of the note" in the other.

26. "And, &c." This clause is unnecessary in an action against either the (165) acceptor of a

See Lill. Ent. 90. 29, 41. 44, 55. 73. Lutw. 1589.

Sheldon v. Occarsen, Tr. T. 41 Geo. 3. 12 June, 1801. C. B. Roll. 715. Special demurrer to a declaration on a bill stated to be payable to the *order* of the plaintiff; and the cause assigned was, that it was not stated that the plaintiff had made no order: the Court said, that it was too clear for argument, and gave judgment for the plaintiff. Best Serj. was to have argued for the defendant. S. P. Smith v. M'Clure, 5 East. Rep. 476.

(165) Wegersloff v. Keene, Str. 214. In assumpsit against the acceptor, an objection was taken to the promise as stated; sed per Fortescue J., "the plaintiff need not set out any promise. In Lowther v. Conyers, which was upon a promissory note, they left out *super se assumpsit*, and yet it was held "well enough, for the law raises a promise."

bill or the maker of a note ; and it may be doubted whether (166) it is essential in any other.

27. "And the said, &c." This averment is not, it is apprehended, ever necessary ; the want (167) of it is no ground for arresting the judgment, though there were a demurrer to the Court, and no verdict upon it nor any judgment by default.

In an action by a person who has paid a bill, under protest, for the honour of drawer or an indorser, it is sufficient for him to allege that he, according to the usage and custom of merchants, paid the bill : he need not specify to whom he paid it. (168)

(166) *Starke v. Cheeseman*, Carth. 509. Salk. 128. After judgment by default in an action against the drawer of a foreign bill, it was objected in arrest of judgment, that it was not stated in the declaration that the defendant promised to pay the money after the protest was made ; but it was answered, that the law did raise the promise upon the custom of merchants, and therefore it was not necessary to lay an actual promise ; and the plaintiff had judgment.

(167) *Simmonds v. Parminter*, 1 Wils. 185. 4 Bro. Parl. Cas. 604. The declaration upon two foreign bills for the payment of 4000 and 5000 dollars did not state what their value was, and after a demurrer this was urged as a ground to arrest the judgment ; but the Court gave judgment for the plaintiff, and upon a writ of error that judgment was affirmed.

(168) *Cox v. Earle*, 3 B. & Ald. 430. Declaration against acceptor on bill paid by plaintiff under protest for the honour of the second indorser stated, that plaintiff, according to the usage and custom of merchants, paid the bill under protest : special demurrer, on the ground that it was not alleged to whom plaintiff paid it, or that he paid it to the holder, or that plaintiff

thereby became the legal holder thereof: sed per cur., on argument, "payment to a wrong person would be no payment; this "payment is alleged to have been according to the usage and "custom of merchants, and plaintiff would be bound to prove "payment to the person entitled to receive." Judgment for plaintiff.

C A P. X.

Remedy upon a Bill or Note by proving it under a Commission of Bankruptcy, or suing out a Commission thereon.

Though the Bill or Note be not due, p. 412.

Though the Holder did not become so until after the Act of Bankruptcy, p. 416.

Though the Bankrupt had committed an Act of Bankruptcy before he became Party to the Bill or Note, p. 417.

In case of Person who takes up the Bill or Note after the Commission, p. 418.

———— *Accommodation Parties who became so before Notice of any Act of Bankruptcy, p. 419.*

———— *counter Acceptances, or other Exchanges of Paper, p. 423.*

———— *Reciprocal Accommodation without specific Exchange, p. 432 to 435.*

———— *Banker accepting Bills and having Bills remitted, p. 434.*

———— *Accommodation Parties, where entitled to remedy inter se, p. 437.*

———— *Bill drawn or accepted on account of a third Person, p. 439.*

———— *Accommodation Parties who became such before, and were continued by renewal after, notice of Act of Bankruptcy, p. 440.*

Under Commissions against several Parties, p. 441.

Where the Bill or Note is holden by a Creditor of the Bankrupt as a Security for the Debt, p. 444.

Proof against the joint and separate Estates of the same Parties, p. 451. to 456.

Interest, p. 456.

Set-off, p. 457.

WHEREVER the holder of a bill or note is entitled to compel a person to pay it, he (1) may, in the

(1) In *ex parte Dewdney*, 15 Ves. 495, Lord Eldon C. held that where recovery in an action on a bill would be barred by a plea of the statute of limitations, and all relief in equity would

event of such person's bankruptcy, prove the amount under his commission ; and whatever would be a defence to a suit (2) will exclude the holder from such proof.

And a bill or note (3) may be proved before it

be equally defeated by lapse of time, to which courts of equity, in analogy to the statute of limitations, give similar effect, the bill could not be proved under a commission of bankruptcy; and after reasoning on the inconsistency which would result from a contrary doctrine, his lordship observed, " that consideration, among others, furnishes a ground for concluding " that the real meaning of the legislature in those acts (the " bankruptcy statutes) requiring the Lord Chancellor to give " execution to all the creditors, was, that this species of execution should be given to those creditors, who, if a commission " of bankruptcy had not issued, could, by legal or equitable " remedies, have compelled payment." See 1 Sch. & Lefr. 48. Where the holder has bought bills or notes for less than the money payable upon them, (as in *ex parte Lee*, 1 P. Wms. 782, where he bought notes for 10s. in the pound,) or where he has discounted them, (as in *ex parte Marlur*, 1 Atk. 150.) as he might have recovered in an action, so he may prove under a commission of bankruptcy, to the full amount.

(2) As to such objections as arise from the form of the bill or note, vide *antè*, c. 1., also *ex parte Adney*, Cowp. 460, and *ex parte Tootell*, 4 Ves. 372. As to the sufficiency of the stamp, vide *antè*, c. 3. As to the transfer, vide *antè*, cap. 5. Acceptance, cap. 6. As to the effect of laches, vide *antè*, cap. 7. As to the legality of the consideration, vide *post*, cap. 12.

(3) By 6 G. 4. c. 16. § 51, Any person who shall have given credit to the bankrupt upon valuable consideration for any money or other matter or thing whatsoever, which shall not have become payable when such bankrupt committed an act of bankruptcy, and whether such credit shall have been given upon any bill, bond, note, or other negotiable security or not, shall be entitled to prove such debt, bill, &c. as if the same was payable presently, and receive dividends equally with the other creditors, deducting only thereout a rebate of interest for what he shall so receive, at the rate of 5*l.* per cent. to be computed

has become due, deducting, on payment of the dividend, a rebate of legal interest for such time as it may then have to run; and it may (under certain (4) restrictions) be proved, though the bankrupt's liability commenced after his act of bankruptcy, and within two calendar months before the date of his commission.

So, the money payable upon a bill or note, if of the requisite amount, though not yet due (5), will be a good petitioning creditor's debt to support a commission of bankruptcy.

And it was held under the repealed provisions of 7 Geo. 1. c. 36. s. 3. and 5 Geo. 2. c. 80. s. 22. that a commission might issue against the drawer of a bill before it become due. (6)

from the declaration of a dividend to the time when such debt would have become payable according to the terms upon which it was contracted.

(4) Vide post, and 6 Geo. 4. c. 16. § 19. post.

(5) By 6 G. 4. c. 16. s. 15. every person who has given credit to any trader upon valuable consideration for any sum payable at a certain time, which time shall not have arrived when such trader committed an act of bankruptcy, may petition or join in petitioning (for a commission of bankruptcy against such trader), whether he shall have any security in writing or otherwise for such sum, or not.

(6) Ex parte Douthat, 4 B. & Ald. 67. Douthat owed Wade 148*l.*, and in order to pay him, drew on Eyre and Miller, in favour of Wade or order, at four months' date: Eyre and Miller accepted the bill, and paid it when due; but in the interim Douthat committed an act of bankruptcy, and Wade sued out a commission against him, and proved the bill. Case from chancery on the question, whether under these circumstances there was at the date of the commission a good petitioning creditor's debt? the Court certified that there was, and their opinion

And that the commission would stand, though the bill when due were paid by the drawee. (6)

And it is sufficient, if the money payable to the holder, be, at the time of (7) petitioning, of the requisite amount, though, by reason of the rebate of interest, it were not of that amount at the time of the act of bankruptcy; but it must be of the requisite amount at the time of the petition.

seemed to be founded not on there being a pre-existing debt to Wade, but on the ground that the statutes 7 G.1. c.31. and 5 Geo.2. c.30. § 22. extended to drawers and indorsers of bills as well as acceptors; and that if such drawer or indorser committed an act of bankruptcy before the bill was due, a commission might at once be sued out thereon.

(7) *Brett v. Levett*, 13 East. Rep. 213. In an action by the assignee of a bankrupt against the sheriff, and verdict for the plaintiff, a rule nisi to set aside the verdict was granted, on a question as to the sufficiency of the petitioning creditor's debt. The debt arose on two bills of exchange, each for 50*l.*, drawn by the bankrupt, and transferred to the petitioning creditor before the act of bankruptcy; both were dishonoured by the drawee. The act of bankruptcy was on the 28th Dec. 1809, and the commission was dated 8th Feb. 1810. Each bill became due before the petition for the commission, but *after the act of bankruptcy*. At the time of the *act of bankruptcy*, therefore, there was not a debt of 100*l.* due to the petitioning creditor, but only that sum minus the rebate of interest for the time which the bills had to run; and it was contended that at *that* time there ought to have been such debt due. But the Court, after referring to 7 Geo.1. c.31. § 3., which disabled a creditor by a bill or note, payable at a future day, from petitioning for a commission in respect of such debt, "until such time as such debt shall become actually due and payable," and to 5 Geo.2. c.30. § 22., which removes such disability, held clearly, that it was sufficient if a debt of the requisite amount were due at the time of petitioning. Rule discharged. See also the judgment of Lord Kenyon in *Glaister v. Hewer*, *infra*, p. 416.

If, therefore, the bill or note be not *then* due, it would (8) seem that he must be a creditor for such sum as, after deducting the rebate of interest for the time which the bill or note has to run, will leave a debt of the requisite amount.

And upon bills or notes which were due at the time of the petition, interest could not, before 6 Geo. 4. c. 16., be taken into the account, unless it were expressly made payable on the face of the bill or note. (9)

Where it was so payable it might. (9)

(8) See 7 G. 1. c. 31. § 1. & 3., and 5 G. 2. c. 30. § 22. & 23. By 6 G. 4. c. 16. § 15., "no commission shall be issued unless the single debt of the creditor, or of two or more persons being partners, petitioning for the same, shall amount to 100*l.* or upwards; or unless the debt of two creditors so petitioning shall amount to 150*l.* or upwards; or unless the debt of three or more so petitioning shall amount to 200*l.* or upwards; and by § 13. the petitioning creditor shall, before any commission be granted, make an affidavit of the truth of his debt." But if this debt arise from a bill or note for 100*l.* not then due, the sum *then* due to him is 100*l.* minus the amount of discount; and if the bill or note be drawn payable at a very distant day, the discount may greatly diminish the sum then payable, and may possibly nearly exhaust it.

(9) *Cameron v. Smith*, 2 B. & Ald. 305. A commission was founded on an acceptance for 96*l.* 17*s.* 8*d.* The bill was so long over due that near 5*l.* was due for interest, but no interest was expressly made payable by the bill. The point was reserved whether this debt would support the commission, and, after argument, the Court was clear it would not; for, though interest, if expressly reserved, constituted part of the debt, yet if it were not expressly reserved, it constituted damages only, and damages cannot be considered part of the debt.

And qu. whether 6 Geo. 4. c. 16. s. 57. has not made an alteration in this respect so as to enable the holder to reckon interest as part of his debt, whether it be or be not expressly made payable to the bill or note? (10)

The holder (11) may petition for a commission of

(10) 6 G. 4. c. 16. s. 57. "In all future commissions against any person or persons liable upon any bill of exchange or promissory note, whereupon interest is not reserved, overdue at the issuing the commission, the holder of such bill of exchange or promissory note shall be entitled to prove for interest upon the same, to be calculated by the commissioners to the date of the commission, at such rate as is allowed by the Court of King's Bench in actions upon bills or notes."

(11) *Glaister v. Hewer*, 7 Term Rep. 498. The plaintiff being indebted to Hewer in a sum below 100*l.* and to Wilson on a note for 11*l.* 12*s.*, committed an act of bankruptcy; on which, Wilson, for a valuable consideration, indorsed his note to Hewer, to enable him to petition for a commission: the two sums together amounting to above 100*l.* In an action of trover for goods taken by the assignees, brought to try the validity of the commission, the only question was, whether Hewer's were a sufficient debt to support the commission, it not being so when the act of bankruptcy was committed, inasmuch as the whole did not then exist in *him*. Rooke J. thought it was, and on a rule nisi to enter a verdict for the plaintiff, Lord Kenyon said, "the statute" only required that there should be an existing debt of 100*l.* in "the petitioning creditor; this petitioning creditor had such a debt at the time of petitioning, and that is sufficient to support the commission." Rule discharged.

Bingley v. Maddison, Co. B. L. 20. A note was given by the bankrupt in January, which became due in June. The act of bankruptcy was in October following, and the indorsement in November. The indorsee was the petitioning creditor, and sued out the commission. It was contended, that at the time of the bankruptcy the petitioning creditor had no debt, and that

bankruptcy, in respect of the money payable upon a bill or note, or may prove the amount under a commission when issued, notwithstanding the bill or note may not have been transferred to him until after the act of bankruptcy committed, and although it were then transferred to him for the very purpose of enabling him to sue out the commission, provided the bankrupt's liability had commenced before the act of bankruptcy: for, the case of a bill or note being one in which the law admits of the assignment of a chose in action, the assignee becomes a creditor as from the time of the original creation of the debt, and not from that of the assignment.

And though the bankrupt may have committed an act of bankruptcy before he became a party to the bill or note, it will not (12) invalidate a commission of bankruptcy issued on the petition of the

therefore the commission could not be supported. But the Court said that this was a case in which the law allowed the assignment of a chose in action: that the assignment related to the original debt: that the indorsee always came in under the commission, because the indorsement related to the original debt: that it stood thus upon principle; and that the cases were clear, explicit, and positive, and of the highest nature: they therefore held the commission valid.

(12) By 6 G. 4. c. 16. s. 19, no commission shall be deemed invalid by reason of any act or acts of bankruptcy prior to the debt or debts of the petitioning creditor or creditors, or any of them, provided there be a sufficient act of bankruptcy subsequent to such debt or debts.

holder, nor (13) prevent the holder's proving the amount under a commission; provided, in the former case, that there be a subsequent act of bankruptcy sufficient to support the commission (12), and in the latter, that the bankrupt had become such party before the (13) date of the commission; and that the holder had not any (13) notice of a prior act of bankruptcy.

If a person liable upon a bill or note be compelled to take it up in consequence of its dishonour by an antecedent party, he will be remitted to his former right (14). He may, therefore, prove under commissions against such of the antecedent parties as would have been liable to him on the bill or note if he had never parted with it (15): and it is immaterial whether he took up the bill or note before, or after, the bankruptcy. (16)

(13) By 6 G. 4. c. 16. s. 47, every person and persons with whom any bankrupt shall have really and bonâ fide contracted any debt or demand before the issuing of the commission against him, shall, notwithstanding any prior act of bankruptcy committed by the bankrupt, be admitted to prove the same, and be a creditor under such commission, as if no such prior act of bankruptcy had been committed; provided such person had not, at the time the same was contracted, notice of any act of bankruptcy by such bankrupt committed.

(14) *Death v. Serwonters*, 1 Lutw. 885 to 888. 7 Tr. 572. 574. 581.

(15) 7 T. R. 572. 574. 581.

(16) *Joseph v. Orme*, 2 New. Rep. 180. The plaintiff, being holder of a bill accepted by the defendant, indorsed it for a valuable consideration to Adams. Before the maturity of the bill, a commission of bankruptcy issued against the defendant,

But if a bill or note be taken up by a person who was not liable thereon, it is essential that he should have taken it up before the act of bankruptcy : otherwise he cannot prove. (17)

By 6 Geo. 4. c. 16. s. 52., any person who at the issuing of the commission shall be surety or liable for any debt of the bankrupt, or bail for the bankrupt, either to the sheriff or to the action, [of course including debts by bill or note, or bail in an action thereon,] if he shall have paid the debt or any part thereof in discharge of the whole debt, (although he may have paid the same after the commission

and the plaintiff was afterwards obliged to pay the bill to Adams, and now sued the defendant as acceptor. The defendant having received his certificate, obtained a rule nisi to enter an exoneretur on the bail piece : and after cause shown, the Court held that the plaintiff might have proved the bill under the commission, and therefore made the rule absolute.

See *ex parte Brymer and Houle v. Baxter*, post.

(17) *Ex parte Isbester*, 1 Rose 20. Isbester held a bill for 400*l.* payable to Bell or order, and indorsed in blank by Bell. M'Cullum gave him cash for it, and Isbester wrote over Bell's indorsement, " Pay M'Cullum or order : " the acceptor having failed, Isbester paid M'Cullum 300*l.* the day the bill became due, and he paid the remaining 100*l.* after the commission against the acceptor had issued. Isbester applied to prove under the commission but was refused : he then petitioned, but Lord Eldon held him not entitled, because he paid when he was not liable to pay : he paid as a volunteer, not by compulsion. But it being doubtful whether the original transaction between Isbester and M'Cullum was intended as a sale of the bill, or as a discount (*antè*, pp. 368, 369.), in the latter of which cases Isbester would have been liable, although his name was not upon the bill, a case was offered ; but it does not appear that it was accepted.

issued,) shall, if the creditor shall have proved his debt under the commission, be entitled to stand in the place of such creditor, as to the dividends and all other rights under the said commission which such creditor possessed, or would be entitled to, in respect of such proof; or if the creditor shall not have proved under the commission, such surety, or person liable, or bail, shall be entitled to prove his demand in respect of such payment as a debt under the said commission, not disturbing the former dividends; and he may receive dividends with the other creditors, although he may have become surety, or liable, or bail as aforesaid, after an act of bankruptcy committed by such bankrupt, provided that such person had not at the time when he became such surety, or bail, or liable as aforesaid, notice (17) of any act of bankruptcy by such bankrupt committed.

This statute repealed 49 Geo. 3. c. 121., in s. 8. of which a similar provision was contained.

If the drawee of a bill, not being indebted to the drawer nor having effects of the drawer in his hands, accept the bill on his own account (18), without receiving any consideration for such acceptance, he is said to accept for accommodation of the drawer, and if the drawer negotiate such bill for value, though both parties are equally liable to the holder, yet, as between themselves the drawer is

(18) See *ex parte Marshall*, 1 Atk. 131. and *ex parte Matthews*, *post*.

primarily liable : he is the principal debtor, and the acceptor is in the (19) nature of a surety.

So, wherever a note or bill is made, drawn, accepted, or indorsed, by or on account of a person who has received no consideration for the same, it is said to be made, drawn, accepted, or indorsed, for accommodation ; and if such note or bill be negotiated, the maker &c. for accommodation, and the person who has received value for the note or bill, are considered as standing in the relative situation of surety and principal.

Before 49 G.3. c.121. a surety paying after the bankruptcy of the principal could not have proved against the principal in respect of such payment ; because, at the time of the bankruptcy there was no debt. The mere liability to pay, without actual payment, raises no debt on the part of the principal (20) ; and debts accruing after the bankruptcy could not be proved.

Therefore, if a bill were accepted or indorsed for the drawer's accommodation, the acceptor or indorser, taking up the bill after the bankruptcy of the drawer, could not prove in respect of such payment. (21)

(19) He is not, strictly speaking, a surety ; and for this reason, the words " person liable " were used in 6 G.4. c. 16. s.52. and 49 G.3. c. 121. s. 8. 3 V. & B. 40.

(20) Ex parte Marshall, post.

(21) *Chilton v. Whiffin*, 3 Wils. 13. (1768). *Young v. Hockley*, 3 Wils. 346. (1772.) *Vanderheyden v. De Poiba*, 3 Wils, 458. (1774.) *Henderson v. Woodbridge*, Dougl. 166.

But, upon equitable grounds, the surety paying after the bankruptcy of the principal, was allowed, when the creditor had received full payment of his debt, to have the benefit of the creditor's proof against the principal. (22)

And 6 G.4. c.16. § 32. appears to be applicable

(1782.) *Ex parte Beaufoy*, Co. B. L. 158. (1787.) *Brooks v. Rogers*, 1 H. Bl. 640. (1790.) *Howis v. Wiggins*, 4 T. R. 714. (1792.) *Snaith v. Gale*, 7 T. R. 364. (1797.)

(22) *Ex parte Marshall*, 1 Atk. 129. (1752.) Drawer, and acceptor for accommodation of the drawer, became bankrupt, and the holders proved and received dividends under both commissions. The assignees of the acceptor petitioned to stand against the estate of the drawer in the place of the holders, pro tanto as the holders had received under the acceptor's commission; and Lord Hardwicke made the order accordingly. But, afterwards, it being objected that the estate of the drawer was by this means charged doubly, Lord Hardwicke ordered that the petitioners should stand in the place of the holders, pro tanto as the acceptor's estate had paid on the bills, but should not receive any dividend until the holders had received a full satisfaction; and if the surplus of the drawer's estate, after the bill-holders were satisfied, should not be sufficient to answer what the acceptor's estate had paid, then nothing in the order was to prejudice the petitioner's right of action against the drawer for the residue of their demand, notwithstanding the drawer has had his certificate; for it seemed to him that the acceptor was not a creditor under the drawer's petition, because his demand was subsequent to it.

See 13 Ves. 414, 416, 417. Lord Eldon considered the order made in *ex parte Walker*, (post, 432.) wrong, because, in the event of a surplus after full payment of the bills, the sureties ought to be allowed to come in against the estate of the principal for what they had paid as sureties: *Jac.* 278, 279, 280. And see Co. B. L. 152. 5th ed.

in this case. (23) It does not apply until the principal debt is wholly discharged; but it does not express that it is necessary the principal debt should be wholly discharged by the surety. But if this be not so, the surety paying only part, and paying such part after the creditor has proved and received a dividend under the principal's commission, may, when the principal debt is wholly discharged, come in for such part upon the creditor's proof. (24)

49 G.3. c. 121. s.8. and 4 G.4. c. 16. s.52. though they enabled a surety to prove in certain cases where proof was previously inadmissible, did not enable him in those cases to sue out a commission. Therefore payment by a surety, after the bankruptcy of the principal, does not constitute a good petitioning creditor's debt (25); although it may be proved under a commission when issued.

Where bills or notes are exchanged, the doctrine of suretyship does not apply. (26)

(23) In *ex parte Read*, post, p. 496, it does not appear whether any dividend had been paid.

(24) See n. (22).

(25) *Ex parte Holding*, 1 Glyn & Ja. 97. 30th September 1820, Cook accepted a bill for the accommodation of Holding; who, on the 26th of January, 1821, surrendered himself to prison in discharge of his bail, and lay in prison more than two months. On the 29th of March, Cook paid the bill, and thereupon sued out a commission. But, on petition to supersede it, Leach V. C. held, that this payment being made by Cook after the act of bankruptcy, could not create a debt to support a commission; and it was accordingly superseded.

(26) *Rolfe v. Caslon*, 2 H. Blackst. 570. *Rolfe and Caslon*

If, for example, A. accept a bill drawn upon him by B., in consideration of B.'s accepting a bill drawn upon him by A., each party is primarily liable on his own acceptance (27): each acceptance is given for sufficient consideration, and raises a debt from the acceptor to the drawer; (26)

And formerly such debt was allowed to be proved under a commission against the acceptor, although the drawer had not taken up his own acceptance (28):

drew two bills, of the same tenor and date, on each other, and each accepted the other's bill, neither having effects of the other in his hands. Twenty days before the bills were due Caslon became bankrupt. He had indorsed the bill with Rolfe's acceptance, in part satisfaction of a larger debt, and the creditor proved his whole debt, and received a dividend. Rolfe paid the difference of the bill he accepted, allowing for the dividend, and now sued Caslon on his acceptance and for money paid; Caslon pleaded his bankruptcy. Verdict for the plaintiff, with liberty to the defendant to move to set it aside. On motion accordingly and rule nisi, it was urged for the plaintiff that this acceptance could not have been proved under the commission, because it created no debt to Rolfe, unless he paid the bill which Caslon drew; and at the time of the bankruptcy it was uncertain and contingent whether he would pay such bill; but the Court was clear that the mutual acceptances constituted a debt on each side; and that the defendant's acceptance might have been proved under the commission, and that therefore the certificate was a bar. Rule absolute. Vide also *Buckler v. Buttevant*, post, p. 426., note (35).

(27) In *Cowley v. Dunlop*, post, p. 427, all the Judges concurred on this point.

(28) *Jacob*, 278.

But it afterwards became the practice to refuse the proof; or, if the proof were admitted, to retain the dividends until the party claiming against the bankrupt had taken up his own acceptance.

Lord Thurlow, in one case (29), admitted the proof, and retained the dividend; but, it is said, he afterwards doubted whether, in admitting the proof, he did not go too far. (30)

Lord Loughborough refused the proof. (31)
Lord Eldon has admitted it, upon bills remitted

(29) *Ex parte* Lord Clanrickarde, Co. B. L. 160. (1787.) Griffin gave Lord Clanrickarde his acceptance for 60*l.* 17*s.* 9*d.*, and an acceptance of Turner's for 200*l.* Lord Clanrickarde being indebted to Griffin, gave him, on receipt of Turner's acceptance, two drafts for the amount of the acceptances and the debt, which drafts Griffin discounted for value. Griffin became bankrupt before his acceptance was due; and his acceptance, being dishonoured, was taken up by Lord Clanrickarde. Turner's acceptance was also dishonoured, and Lord Clanrickarde petitioned for liberty to prove against Griffin, as a debt due to him before the bankruptcy, the amount of the two acceptances. Lord Thurlow admitted the proof, but staid the dividend until the account relative to the other bills should be finally settled. But, it is said, he afterwards expressed a doubt to Lord Eldon, then Attorney-General, whether he had not gone too far in permitting Lord Clanrickarde to prove: 4 Taunt. 205.

(30) 4 Taunt. 205.

(31) *Ex parte* Ward (1794) at 4 Taunt. 205. Petition to be allowed to prove on cross bills of exchange. Lord Loughborough C. held that the petitioner, not having taken up his own bills, could not be allowed to prove; and dismissed the petition.

to a banker, to cover his acceptances for the bankrupt's accommodation. (32)

Where acceptances are exchanged, if either party be called upon to pay both acceptances, his remedy is upon the other's acceptance, and not upon any implied promise of indemnity, as in the case of principal and surety (33);

Ex parte Everett, (May 3. 1800.) Cit. 4 Taunt. 204. The assignees of Dickson petitioned that they might be at liberty to prove a debt under the commission against Caldwell and Co., who had accepted bills for Dickson; and Dickson had given them counter bills, which were not then paid. Lord Loughborough held they could not prove the debt until the bills accepted by Dickson had been taken up.

(32) *Ex parte Bloxham*, post.

(33) *Buckler v. Buttevant*, 3 East's Rep. 72. The defendants gave the plaintiffs their bills, accepted by third persons, in exchange for the plaintiff's acceptances of bills drawn by the defendants on him. Each bill tallied in amount with that for which it was exchanged, except that in one instance two bills were given in exchange for one of the aggregate amount of both; and in another instance there was a difference (between the bills last exchanged) of a few shillings which were paid at the time, in order (as it was expressed) "to finish the transaction." They also agreed in dates, except that in two instances bills were made payable two days earlier than those for which they were respectively exchanged. The defendants' letters, in which they enclosed their remittances, always spoke of "valuing" on the plaintiff "for the same amount:" and the whole correspondence pointed at nothing else than an exchange of paper. The defendants became bankrupt; when the commission was issued the plaintiff had paid the whole amount of his acceptances to the holders, except 49*l.*, and he proved the money so paid, under the commission. He after-

And the party taking up the other's acceptance after the holder has proved it and received a divi-

wards paid the balance of 49*l.*, and brought this action for money paid, to recover that sum. All the bills received by the plaintiff from the defendants were dishonoured. A verdict was found for the plaintiff, subject to the opinion of the Court. The Court held that this was an absolute exchange of acceptances; that each party's remedy against the other was upon the other's bills only; and that therefore this action, which was founded on an implied promise, and not on the bills, could not be supported. *Postea* to the defendant. *Vide* *Toussaint v. Martinant*, 2 Term Rep. 100.

Cowley v. Dunlop, 7 Term Rep. 565. The Peters and Dunlops exchanged acceptances to the amount of 3000*l.* and upwards, under an agreement that each should provide for their own acceptances. Both houses became bankrupt, and obtained their certificates. The Peters paid part of their acceptances; and their assignees paid dividends upon the rest, and also upon Dunlop's acceptances. Dunlop's acceptances were also proved under Dunlop's commission, and a dividend paid thereon. The Peters' assignees having paid considerably more than the Peters' proportion upon the bills, brought an action for money paid against the Dunlops: the question was, whether their bankruptcy was a bar? After two arguments, the Court was divided: Lawrence and Grose Js. held that the plaintiffs were not entitled to recover, and they are reported to have expressed their opinion, that, upon the exchange of the acceptances, a debt arose upon each bill from the acceptors to the drawers, which debt the drawers, had they been holders of the bills at the time of the bankruptcy of the acceptor, might have proved under the acceptor's commission; and their having negotiated the bills made no difference; because, when the bills were returned to them, they were remitted to their former right, and stood in the same situation as if they had never parted with the bills; and they denied that they stood in the relative situation of principal and surety. But afterwards, in *Buckler*

dend under the other's commission, cannot make any further proof in respect of such bill. But, upon equitable principles (34), if not under 6 G. 4. c. 16. s. 52., he will be entitled to the benefit of the holder's proof;

And in such case, if the bankrupt acceptor obtain his certificate, the other party will be barred at law: for, the certificate is a bar to all claim upon the bill (35); and it is only upon the bill that claim (36) can be made.

v. Buttevant, 3 East, 83., Lawrence J. said, "Grose J. and he were misunderstood if it were imagined they considered that the amount of the bills given by the Dunlops could have been proved by the Peters under the Dunlops' commission; they did not suppose that, but only endeavoured to show that the Dunlops having received a consideration for their own acceptances in the acceptances of the Dunlops, could not resort to an action upon an implied assumpsit against the Dunlops on the ground of having paid the acceptances of the latter as well as their own." Ashhurst J. considered it as a mere case of principal and surety. Lord Kenyon was of opinion that each party was primarily liable on his own, and surty on the others', acceptance, and that, therefore, the money paid after the bankruptcy could not have been proved under the commission: but if the bills, though once negotiated, had come back again to the Peters, they would have been remitted to their better right, and might have proved their debt under the Dunlops' commission; but they could not prove the bills after proof by the holders: and he, therefore, thought the plaintiffs entitled; but, as the Court was divided, no judgment was given.

(34) *Antè*, p. 422.

(35) See Lord Kenyon's judgment in *Cowley v. Dunlop*, 7 T. R. 581.

(36) *Buckler v. Buttevant*, and *Cowley v. Dunlop*, *antè*, pp. 426, 427.

The law is the same where the acceptances exchanged are not the acceptances of the parties to the exchange, but of other persons (37);

And where notes are given in exchange one for

(37) *Buckler v. Buttevant*, antè.

Ex parte Hustler, 1 Glyn. & Ja. 9. (1821.) Six persons carried on the business of bankers in partnership, at Bishop Wearmouth, under the firm of Jacksons, Goodchilds, and Co., and in London under the firm of Goodchilds, Jacksons, and Co.; and two of them were in partnership in London under the firm of John and William Jackson. Gowland accepted a bill drawn upon him by John and William Jackson, in consideration of a bill for the same amount drawn by Goodchilds, Jacksons, and Co. upon and accepted by Jacksons, Goodchilds, and Co., but without John and William Jackson's indorsement; and at the same time the interest was settled as between the two bills becoming due at different times. Gowland paid his own acceptance, and upon the bankruptcy of Jacksons, Goodchilds, and Co. proved their acceptance under their commission, stating in his affidavit that he had received no satisfaction or security for it, and that the consideration was money advanced: the commissioners allowed Gowland to prove the amount of his acceptance against the estate of John and William Jackson, and on petition to expunge such proof, Leach V. C. held the bill accepted by Gowland was to be considered as an ordinary accommodation acceptance, for which Jacksons, Goodchilds, and Co.'s bill was only a security, and that having paid his acceptance before the bankruptcy, the proof was rightly admitted; but on appeal Lord Eldon C. said, "the question is, whether this transaction was not an exchange of paper—whether Gowland was not to look for payment to the bill put into his hands?" and he held that it was an exchange of paper, that the consideration of Gowland's acceptance was the bill he received at the same time, and therefore the proof was not admissible.

the other (38); and where bills are given in exchange for notes. (39)

It is not essential (40) that the bills exchanged should agree precisely in amount, or in the times at which they respectively become due: any difference in these respects is merely evidence upon the

(38) *Ex parte Beaufoy*, Co. B. L. 158. (1787). Beaufoy, for accommodation of Mitchell and Cleeter, gave them his note for 400*l.*, which they deposited with their bankers, as a collateral security, to induce the bankers to accept and pay Mitchell and Cleeter's bills. This note was afterwards renewed. Beaufoy afterwards gave Mitchell and Cleeter another note for 400*l.*, which they indorsed, and deposited with the bankers; and, in exchange for the last-mentioned note, Mitchell and Cleeter gave Beaufoy their note for 400*l.* On the 13th of April, 1785, a commission of bankrupt issued against Mitchell and Cleeter; and on the 14th, Beaufoy, being called upon by the bankers to take up his two notes, gave them his bond for the amount, and the notes were returned to him. He then petitioned to be allowed to prove a debt of 800*l.*, being the amount of his own two notes; but Lord Thurlow ordered that he should be at liberty to prove Mitchell and Cleeter's note, and dismissed the petition as to the rest.

(39) *Ex parte Maydwell*, Co. B. L. 157. (1785.) Stevens, for accommodation of Prior, joined with him in a note for payment to Maydwell of 95*l.* 15*s.*, on the 18th, and 203*l.* on the 22d, of January; and Maydwell, in consideration thereof, accepted two bills drawn on him by Prior, dated respectively the 16th and 29th of October, and payable three months after date, one for 95*l.* 15*s.*, the other for 203*l.* Before the note or either of the bills became due, commissions of bankrupt issued against Stevens and Prior. Maydwell paid the bills when they became due, and then petitioned to prove the note under Stevens's commission. Lord Thurlow ordered accordingly.

(40) *Vide* *Buckler v. Buttevant*, *antè*, p. 426.

question whether the bills were really exchanged or not.

The money payable upon a counter acceptance will (41) not be a good petitioning creditor's debt

(41) *Sarratt and another v. Austin*, 4 Taunt. 200. In trover by the assignees of a bankrupt against the sheriff for goods taken in execution, the only question was as to the sufficiency of the petitioning creditor's debt. He and the bankrupt had drawn two bills on each other of precisely the same tenor and dates, and each had accepted the other's bills. Before any of the bills became due, the bankrupt committed an act of bankruptcy, upon which a commission was issued founded upon the acceptances so given by the bankrupt. Not one of the bills was due or paid when this action was brought. A verdict was found for the plaintiffs, with liberty to the defendant to move to set it aside and enter a nonsuit. On rule nisi accordingly and cause shown, three manuscript cases were cited to show that where there are cross acceptances neither party can prove under a commission of bankruptcy, until he has taken up his own acceptance. Mansfield C. J. said, "If those cases had not been mentioned, I should have had no doubt that either party might prove : that the debt is barred by the certificate has been decided ; why is it barred ? because it might have been proved under the commission : it is strange to say then that it cannot be proved ; either the one or the other must be wrong." And after time taken to consider, his Lordship, in delivering the opinion of the Court, said, "this question depends on the construction of 7 Geo.1. c.31. and 5 Geo.2. c.30. taken together : the preamble of the former act only contemplates the case of bills and other securities being taken for goods sold, and has not the least mention of their being taken where a debt is not clearly due. The act does not apply to debts in their nature contingent. This debt, though not contingent on the face of the instrument, is thus far in its nature contingent that, until the party taking the bankrupt's acceptance shall have paid his counter bill, the Court of Chancery will restrain him from receiving any dividend : and it would

to support a commission ; unless it appear that the petitioning creditor has taken up his own acceptance.

Mere reciprocal accommodation, without specific exchange of bills or notes, will not create a debt on either side. (42) Each party in such case becomes

“ be a singular construction of the statutes, that a man, who will
 “ not be entitled to receive a shilling out of the bankrupt’s
 “ estate unless he take up his own acceptance, should be able
 “ to petition for a commission. And no case being cited to
 “ show that he can, the Court upon principle think the debt
 “ not sufficient to support the commission.” Rule absolute.

(42) *Ex parte Walker*, 4 Ves. 373. (1798.) Various accommodation transactions had for many years taken place between Caldwell and Co. and the Brownes. The former were the bankers of the latter. A commission of bankruptcy issued against Caldwell and Co. in March, 1793, and in the same month the Brownes became bankrupt. An account was then taken of the mutual debts and credits. That account consisted, first, of a cash account, which included good bills as well as payments in cash ; and secondly, of a bill account. The result was, that on the cash account the Brownes were indebted to Caldwell and Co. in the sum of 40,716*l.*, and that on the bill account Caldwell and Co. had received from the Brownes bad bills to the amount of 305,149*l.* 19*s.* 10*d.*, and the Brownes had received from Caldwell and Co. bad bills to the amount of 204,910*l.* 5*s.* Of the bad bills received from Caldwell and Co. the Brownes had negotiated bills to the amount of 196,589*l.* 6*s.* 4*d.*, and of those received from the Brownes, Caldwell and Co. had negotiated bills to the amount of 126,855*l.* 11*s.* 10*d.*, having retained the residue (*viz.* 178,294*l.* 8*s.*) at the request of the Brownes. All the bills received by the Brownes were discountable, and upon most of them they had received the full value ; and Caldwell and Co. had no consideration for them but the bad bills received from the Brownes. Putting then the cash account out of the question,

surety for the other on the bills and notes negotiated by the other ; and until obliged to pay such bills

the Caldwells were primarily liable for the bills they had negotiated ; and the Brownes were primarily liable on the bills the Brownes had negotiated ; and the liability of the Caldwells for the debt of the Brownes exceeded the liability of the Brownes for the debts of the Caldwells by 69,733*l.* 1*s.* 6*d.* All the bills (or nearly so) which the Brownes had negotiated, were proved against the estate of Caldwell and Co., and by far the greater part against the estate of the Brownes also ; but to a large amount, viz. 80,000*l.*, the Brownes had deposited bills as a security for the payment of a much smaller sum, so that the proof against them in respect of those bills was only for the sum really due, whereas against Caldwell and Co. the proof was for the whole sum payable on the bills ; and the consequence of this, and of the unequal negotiation of each other's bills, was, that a much larger sum was proved against Caldwell and Co. in respect to bills negotiated by the Brownes, than against the latter in respect of bills negotiated by the former. Caldwell and Co., on petition, claimed the right to prove the bills which still remained in their hands, for the purpose of covering the damage that their estate would sustain by paying dividends on the bills which had been negotiated by the Brownes, and also to prove the amount of the dividends they had paid on the excess of their liability, in order to be reimbursed the difference. But Lord Loughborough said, " Till Caldwell and Co. pay all the creditors of Browne, who are likewise creditors of theirs, 20*s.* in the pound, they would be, by proving, sharing with the creditors of Browne, who are likewise creditors of theirs. If I allow this petition, I must do two things that are quite impossible. I must hold that the bankruptcy creates a debt which did not exist antecedently ; and I must hold that the same debt may be proved twice." He held, therefore, that, in taking the accounts between the two estates, the bills dishonoured were to be excluded, and the proof confined to the balance on the cash account only. This abstract is taken not only from Mr. Vesey's but also Mr. Cook's report of this case. Cooke, B. L. 162. See also *ex parte Earle*, 5 Ves. 833.

or notes, he acquires no right to sue the other, or, in the event of his bankruptcy, to prove under his commission.

And after he has been obliged to pay the bills or notes negotiated by the other, his right of action or of proof does not arise upon the bills or notes, but in respect of the money paid to the use of the other.

But where a banker, from time to time, advanced money, and accepted and discounted bills for a customer, and, in return, the latter remitted bills drawn by him and accepted by others, and afterwards became bankrupt; Lord Eldon permitted the banker, though his acceptances were not then due, to prove the bills so remitted under a commission issued against the customer. (45)

(45) *Ex parte Bloxham*, 8 Ves. 531. (1803.) The bankrupt kept an account with the Bloxhams as his bankers; in the course of which they advanced money, and accepted and discounted bills for him; and he, from time to time, remitted bills to them drawn by him and accepted by others; these remittances were made previously to the bankruptcy, some before and some after the acceptances of the bankers. At the date of the commission the bankers were under acceptances, and they held bills so remitted; neither the acceptances nor the bills being due. On petition, Lord Eldon observing that, "in *ex parte Maydwell*, Cooke, B. L. 157., Lord Thurlow held that the "liability by the acceptance was a good consideration for a "promissory note, and permitted the proof," ordered that the bankers should be permitted to prove the bills upon which the bankrupt's name appeared, to cover their acceptances. See also *Bosanquet v. Dudman*, *post*, p. 501.

But, in *ex parte Maydwell* the party who was allowed to prove had taken up his own acceptance.

Where there had been reciprocal accommodation between two houses, both of which became bankrupt, Lord Loughborough held, that such of the bills negotiated by either house as were eventually dishonoured were, in taking the accounts between the two houses, to be totally disregarded; and that the balance of the cash account (in which account bills eventually honoured were to be included as cash) should be proved. (46)

In a subsequent case (but prior to 49 G.3. c. 121.) where the creditor upon the cash account had negotiated bills received from the debtor, to an amount exceeding the cash balance, and both parties became bankrupt, Lord Eldon allowed the cash balance to be proved (47), but withheld the dividend until the estate of the debtor on the cash account

(46) *Ex parte Walker*, *antè*, p. 432.

(47) *Ex parte Metcalfe*, 11 Ves. 404. (1805.) Palmer had received from Williamson, in cash and bills, 642*l.* 9*s.* 3*d.*, and Williamson had received from Palmer, in cash, 582*l.* 19*s.* 7*d.* Both became bankrupt. Palmer had negotiated the bills; some of which, to the amount of 1098*l.*, were dishonoured by the drawee; and Palmer's assignees contended that the amount of these bills should be deducted from the 642*l.* 9*s.* 3*d.*, which would reduce the sum received by him to 532*l.* 9*s.* 3*d.*, making a balance of 498*l.* 10*s.* 4*d.* in his favour, which balance they contended they were entitled to prove against Williamson's estate. On petition to prevent such proof, Lord Eldon C. ordered that the proof of the 498*l.* 10*s.* 4*d.* should be allowed; but that Williamson's assignees should retain the dividends upon such proof, in order to exonerate that estate from any demand which might be made in respect of the bills, which should have been taken up by Palmer.

should be discharged from liability in respect of the bills.

It has been objected, that in both these cases double proof was allowed. (48) In a subsequent case, *Leach v. C.* held that the bills, negotiated by the creditor on the cash account, represented the cash balance, or so much thereof as they equalled in amount; and that, after proof of the bills, the cash balance represented by such bills could not be proved (49); for, if it were, there would be double proof.

(48) 2 Christ. B. L. 388 et seq. 393 et seq.

(49) *Ex parte Read*, 1 Glyn & Ja. 224. (1822.) Read accepted, for the accommodation of Lynn, bills to the amount of 644*l.*, and guaranteed debts of Lynn to the amount of 773*l.*; and Lynn gave Read a note for 1603*l.* for a particular debt due from Lynn to Read, and three bills for 1000*l.* each, drawn by Lynn upon Stalker; which note and three bills Read negotiated, and they were dishonoured. Lynn negotiated Read's acceptance, and became bankrupt, being indebted to Read, on the balance of the cash account, in the sum of 3576*l.*, including the 1603*l.* for which the note was given. Read's acceptances, and Lynn's debts, and Lynn's note, and two of the bills drawn on Stalker, were proved under the commission. Read, being insolvent, compounded with his creditors, and accordingly paid the holders of his acceptances, and the parties whose debts he had guaranteed, nearly 1900*l.* He then petitioned that the unpaid bills and liabilities should be excluded from both sides of the account between him and the bankrupt; and that he might prove the cash balance, and the difference between the dividend paid by the bankrupt's estate upon the bills and note negotiated by Read (on which, putting the cash account out of the question, Read was primarily liable), and the composition paid by Read on his acceptances, and the bankrupt's debts (on which the bankrupt was primarily liable); and

If a man who for accommodation of the drawer has indorsed an accepted bill be compelled to take it up, he may sue the acceptor (50), or, in the

it was contended that the case was within the principle of *ex parte Walker* and *ex parte Earle*, (antè, p. 432.) or, if not, then that upon the principle of *ex parte Metcalfe*, (antè, p. 435.) the petitioner was entitled to prove the cash balance, the dividend being retained to meet what should be overpaid by the bankrupt's estate on the bills and note negotiated by Read; or to prove the cash balance, upon an undertaking to indemnify the bankrupt's estate.

Leach V. C. said, "It is not necessary to refer to *ex parte Walker* and *ex parte Earle*, inasmuch as the act of 49 Geo. 3. has introduced a new principle, by which cases of this sort must now be tried. By that act, a surety paying after the bankruptcy of the principal, can only prove against the estate of the bankrupt where the creditor has not proved, or stand in the place of the creditor on the bankrupt's estate, where the creditor has proved; and there cannot be double proof. Try the case of the accommodation bills by this principle: Read accepts, for the accommodation of the bankrupt, bills to the amount of 6444*l.*, which remain wholly unpaid at the time of the bankruptcy. These bills are all proved by the holders; and if Read were now to pay these bills, it would form no ground of further proof; all that Read could claim would be, to have the benefit of the proofs already made upon these bills against the estate. With respect to the cash balance, part of it is represented by the promissory note of 1603*l.*; and the residue is more than covered by Stalker's bills, which, as well as the note, have been proved against the bankrupt's estate, by the holders with whom the petitioner negotiated them, and the debts guaranteed by the petitioner have also been proved." Petition dismissed.

See *ex parte Maskelyn*, 1 Cox, 394.

(50) *Houle v. Baxter*, 3 East's Rep. 177. The defendant, a retail silversmith, ordered goods of Capper, a working silversmith, and to enable him to obtain silver for the order, accepted a bill

event of the acceptor's bankruptcy, may prove (51) the bill under the commission, although the acceptance were given for accommodation.

But, if a stranger take up, and pay, for the honour of the drawer, a bill accepted and dishonoured by the acceptor, he has no right against the acceptor, if the acceptance were given for accommodation. (52)

drawn on him by Capper; and to increase the credit of the bill, Capper prevailed on the plaintiff to lend his indorsement. Capper then passed the bill to Abud, who supplied the silver for the goods which were made and delivered to the defendant. On the 7th of November, 1796, the defendant became bankrupt, and afterwards obtained his certificate. On the 24th of December, 1796, the day before the bill became due, the plaintiff took it up from Abud, and now sued the defendant as acceptor. A verdict was found for the plaintiff, subject to the opinion of the Court. And Grose J. who delivered the opinion of the Court, said, "here the plaintiff never became surety to the *defendant*; his demand arises solely on the bill, and "there was nothing to prevent his proving it under the commission. The bankruptcy and certificate is therefore a bar." Nonsuit entered.

(51) *Ex parte Brymer*, Co. B. L. 165. (1788.) Three bills, drawn and accepted for accommodation of Scott and Pearson, were indorsed for their accommodation by Span, who got them discounted, and remitted the money to them. Before the bills became due, Scott and the acceptor became bankrupt. Span was afterwards compelled to take up the bills, and was admitted to prove them under the acceptor's commission; and on a petition to have that proof expunged, Lord Thurlow said, "the debt accrued by the acceptance, and Span became the holder in a fair way." Petition dismissed; and on a petition for a rehearing, Lord Thurlow continued of the same opinion.

(52) *Ex parte Lambert*, 13 Ves. 179. *Contrà ex parte Wackerbarth*, 5 Ves. 574.

Where a bill is drawn upon A. *on account of* B., and A. accepts it on B.'s account, he stands in the situation in which B. would have stood had B. been drawee and acceptor.

Therefore, if A. had no effects of the drawer, yet if B. had, the drawer may prove the bill under a commission of bankrupt issued against the acceptor (53);

So, if a bill be drawn on account of A., A. may be entitled to stand in the place of the drawer. Therefore, if a creditor of A. draw by A.'s desire upon a debtor of A., and the drawee accept the bill on account of A., and become bankrupt, the drawer may prove the bill under the acceptor's commission, and if A. take up the bill he is entitled to the benefit of such proof. (54)

(53) *Ex parte Matthews*, *infra*.

Ex parte Marshall and others, 1 Atk. 131. Watkin having dealings with Garway, and Garway with Hatton, it was agreed between the two latter that Hatton should answer such bills as Watkin should draw on him on Garway's account. Watkin drew accordingly on Hatton for 4000*l.* having effects in Garway's hands beyond that amount. Hatton accepted the bill, though he had no effects either of Garway or Watkin in hand; he afterwards refused payment, and Watkin was obliged to pay the bill, and proved it under a commission of bankruptcy issued against Hatton. Hatton's assignees petitioned to have the debt expunged, but the Chancellor held that Watkin was entitled to prove, because of his having had effects in Garway's hands beyond the amount of the bill. Petition dismissed.

(54) *Ex parte Matthews*, 6 Ves. 285. Matthews being indebted to Garland and Co. directed Caldwell and Co., his bankers, to give an order to Burton, Forbes and Gregory (on whom they

If an acceptance or indorsement for the accommodation of a trader be given before, and renewed after, he has committed an act of bankruptcy, such renewal is a continuation of the same suretyship; and, therefore, if a commission of bankruptcy be issued against him, and the acceptor or indorser afterwards pay the bill, he (55) will be entitled to prove

drew), to accept a bill to be drawn by Garland and Co. for the amount of their debt. The bill was drawn by direction of Matthews and accepted accordingly. Before it became due Caldwell and Co., and Burton, Forbes and Gregory, became bankrupt. Garland and Co. proved the bill under the acceptor's commission, but afterwards received the whole amount of the bill from Matthews; on which the proof was expunged; and on petition that it might be restored for Matthews' benefit, it appearing that Matthews had effects in the hands of Caldwell and Co. beyond the amount of the bill, and that he had given them credit for that amount, the proof was ordered to be reinstated.

(55) *Stedman v. Martinant*, 13 East's Rep. 127., and vide S. C. 12 East's Rep. 664. On 5th of January, 1807, the plaintiff accepted a bill for the accommodation of the defendant, the drawer, which became due on the 19th of March, when it was dishonoured. On the 18th of March, 1807, a docket was struck against the defendant, and on the 21st a commission of bankruptcy was issued, which was superseded on the 15th of April. A meeting of the defendant's creditors was then held, when time was given him to pay his debts by instalments. On the 9th of June, 1807, the plaintiff accepted a second bill for the defendant, in order to take up the former one, for the same sum with the addition of interest and stamp: and the indorsement of a third person was lent as an additional security, which was required by the holders of the former bill. On the 6th of August, 1807, a valid commission was issued against the defendant, founded on an act of bankruptcy committed in the preceding March. The second bill became due on the 12th of September, 1807, when the plaintiff paid it. The first dividend under the

the amount under such commission ; though, before the renewal of the acceptance, he had notice of such act of bankruptcy having been committed.

Nor will the case be varied in principle, by the circumstance of the holder of the first bill having, before the renewal, given time to the person for whose accommodation the acceptance or indorsement was lent ; nor by that of an additional name, as that of an indorser, having been lent upon the second bill.

If more than one of the persons liable on account of the non-acceptance or non-payment of a bill or note become bankrupt, the holder may prove, under the separate commission of each, the full (56) amount of the money due to him upon

commission was declared and made on the 6th of August, 1808. On the 4th of September, 1809, the defendant obtained his certificate. In an action for money paid, the bankruptcy and certificate being pleaded, a verdict was found for the plaintiff subject to the opinion of the Court, as to whether the certificate was a discharge. The Court (Lc Blanc J. absente) held that the second acceptance was a continuation of the same suretyship, which was created by the first ; and that as such suretyship commenced before any act of bankruptcy committed, and, consequently, before the plaintiff could have any notice of such act, the plaintiff might, by 49 G. 3. c. 121. s. 8., have proved his demand under the commission, and, therefore, the certificate was a bar. *Postea* to the defendant.

(56) *Ex parte Wildman*, 1 Atk. 109. 2 Vez. 113. Wildman held bills drawn by Buckle and accepted by Vanhylik : Vanhylik failed, and made a composition with his creditors, and Buckle became bankrupt. Wildman, having received nothing under Vanhylik's composition, proved his whole debt under

the bill or note at the time he makes his proof, and receive dividends under each upon the sums proved, until he shall in the whole have received such amount.

But after the (57) receipt, (or even the declara-

Buckle's commission; but before any dividend was made he received 2s. 6d. in the pound out of Vanhylik's estate. Buckle's assignees then contended that he ought to deduct the 2s. 6d. in the pound out of his proof, and take a dividend upon the balance only: but Lord Hardwicke held, that as the whole sum was due when he proved his debt, and the dividend and composition would not amount to 20s. in the pound upon his debt, he was entitled to a dividend upon his whole debt; and per Lord Hardwicke, "In cases of bills or notes, where there is a drawer, and perhaps several indorsers, suppose two of these persons become bankrupts, the holder may prove his *whole debt* under each commission, and is entitled to receive satisfaction out of both estates, according to the dividends to be made, until he has received satisfaction for his whole debt: for he has a double security, and it is neither law nor equity to take it from him. But, if before the bankruptcy of one he had received payment of part from the other, he could only have proved the residue under the latter bankruptcy, as the form of proving his debt shows, because no more would remain due to him." To the same effect are the cases of *ex parte Royd* and *ex parte Bennett*, cited 2 Ves. 114.

And see *Cooke's Bankrupt Laws*, 170.

(57) See *ex parte Wildman*, *antè*, p. 441.

Cooper v. Pepps, 1 Atk. 106. The holders of notes drawn by Reeves, and payable to Andree, accepted 6s. in the pound from Andree; and Reeves having become bankrupt, the question was, whether they might prove the whole debt under his commission? and Lord Hardwicke held they could not, but that the 6s. in the pound must go in discharge of so much of the debt, and they could only prove the remaining 14s. The same point was ruled in *ex parte Ryswick*, 2 P. Williams, 89. and *ex parte Lefebvre*, 2 P. Williams, 409.

tion), (58) of a dividend under one commission, he cannot prove under any of the rest more than the sum remaining due after deducting such dividend.

Unless he offered to prove before any such

Ex parte the Royal Bank of Scotland in re Stein and Co. 2 Rose, 197. (February, 1815.) The Royal Bank of Scotland held bills of Stein and Co., accepted by Kensington and Co., to the amount of 58,000*l*. Kensington and Co. became bankrupts, and the Scotch Bank proved under the commission to the extent of 40,000*l*. January, 1813, a commission having issued against Stein and Co., they entered a claim for the 58,000*l*., but they had not then an affidavit of the debt. Feb. 6th, an affidavit of the debt was made; Feb. 13th, a dividend of 6*s*. in the pound was declared under Kensington's commission, and that dividend was, without the knowledge of the Scotch Bank, paid to their agent; March 27th, (the first meeting after February 6th,) the Scotch Bank claimed to prove the 58,000*l*. under Stein and Co.'s commission. The assignees insisted they should deduct the dividend paid under Kensington's commission, and the commissioners thought them bound so do. On petition, Lord Eldon C., though reluctantly, thought the commissioners right. The only cases to the contrary were in Gibson and Johnson's bankruptcy, where the claim was improperly rejected, and the proof was allowed, according to what was the right at the time of the claim.

See Cooke's Bankrupt Laws, 170.

(58) Ex parte Leers, 6 Ves. 644. Leers was holder of a bill which had been drawn upon, and accepted by, persons at Hambro', and indorsed by the payees to Pierre de Rucsnas at Hambro', and by him to Leers. It was protested for nonpayment. A commission issued against the payees, and the acceptors and last indorser were also made bankrupts. Leers had the amount of the bill claimed against the estates of each of the last-mentioned parties, according to the due course at Hambro', and a dividend was declared of each estate. He had not received any part of either of these dividends; and the question was whether he might prove the whole bill against the estate of the payees? Lord Eldon, after hearing that the practice (the principle of which he doubted) was against such proof, ordered that these dividends should be deducted.

dividend, and his claim were improperly disallowed; for, then his right will stand as it was when the claim was made. (59)

But making a claim, if it be not sufficiently supported at the time, will be of no avail. (59)

Where property of a bankrupt is holden by a creditor as a security for his debt, it will either be sold, the proceeds deducted from the debt, and proof made for the residue. (60) Or, if the creditor insist upon proving his whole debt, he must give up the security for the benefit of the creditors at large. (61)

Where a bill or note, indorsed by the bankrupt, is given by him to his creditor, *primâ facie* the property is in the creditor; the indorsement is evidence that the bill or note was given not as a security, but as payment. (62)

But this circumstance is not conclusive. (63)

The indorsement might have been made merely to enable the creditor to obtain payment from the other parties without giving him any demand upon the bill or note against the indorser. (64)

In such case the bill, though indorsed by the bankrupt, will be sold (65); or delivered up for the benefit of the creditors at large.

(59) See *ex parte* the Royal Bank of Scotland, *antè*, p. 443.

(60) 19 Ves. 231.

(61) *Ex parte* Grove, 1 Atk. 105.

(62) 19 Ves. 231. *Ex parte* Rufford, *infra*.

(63) 19 Ves. 231. *Ex parte* Baldwin.

(64) 19 Ves. 231, 232, 233.

(65) *Ex parte* Baldwin, *cit.* 19 Ves. 230. And see n. (73.)

When the bill is so sold, the vendee will not be allowed to

So, where a debtor executes a mortgage to his creditor for securing the debt, and remits him bills, some with, and others without the debtor's indorsement thereon; the inference is that the bills indorsed are remitted as securities. (66)

So, if a bill be indorsed and remitted by the indorser for the purpose of enabling the remittee to raise money thereon, the property in such bill is not, as between the parties, transferred by such indorsement: such bill in the hands of the remittee will be a security for any debt due to him from the indorser. (67)

If it do not appear that the bill was given as a security, the proof should be made on the bill, not on the debt; for, of the debt, it is considered as payment pro tanto. (68)

It seems, however, to be of frequent occurrence under these circumstances to prove the debt and exhibit the bills as securities. (68) (69) (70)

prove against the bankrupt; for, an indorsee, who became such after a commission issued against a party to the bill, can prove under such commission no more than the holder of the bill at the time of the bankruptcy could have proved thereon (*ex parte Deey*, 2 Cox, 423.); in this case the holder at the time of the bankruptcy could have proved nothing upon the bill.

(66) *Ex parte Baldwin*, 19 Ves. 231, 232. Lord Eldon appears to have concurred with the decision in *ex parte Baldwin*, supposing it to have been such as is mentioned, 19 Ves. 231: but, according to *Mont. New Decisions in Bankruptcy*, 68. n. all the bills were indorsed by the bankrupt.

(67) 19 Ves. 232.

(68) *Ex parte Twogood*, post, p. 447.

(69) *Ex parte Rufford*, 1 Glyn & Ja. 41. Hancocks and Knight proved a debt of 1517*l.* 2*s.* 2*d.* under a commission

But such informality will not be allowed to prejudice the rights of the other creditors.

Where, therefore, under these circumstances, the debt is proved, and bills exhibited as securities, if the amount of one or more of the bills be wholly paid, either by other parties (68) (70), or partly by other parties and partly by the estate of the bankrupt (69); such amount will be deducted from the proof so that dividends will be paid on the residue only.

And where the bill is paid partly by other parties and partly by the estate of the bankrupt, whatever the creditor may afterwards receive upon it from the other parties he will receive in trust for the assignees. (70)

against George and Thomas Wood, exhibiting as securities two promissory notes, and a bill for 600*l.* drawn by the bankrupts, payable to their own order, and endorsed by them to Hancocks and Knight. The acceptor of that bill afterwards became bankrupt, and Hancocks and Knight proved the bill, and received 15*s.* in the pound under his commission. They also received under Wood's commission 5*s.* in the pound on the whole of their proof. On petition by Wood's assignees to have the proof of the debt reduced by expunging the proof of the 600*l.* on which Hancocks and Knight had received 20*s.* in the pound, Leach V. C. said, "the proof ought not to be expunged; but, considering that the bill having the bankrupt's name upon it could not be sold as a general security for the whole debt, it must be taken as in payment of the particular sum of 600*l.*, and Hancocks and Knight must be restrained from receiving further dividends on that sum." Ordered accordingly.

(70) *Ex parte Burn*, 2 Rose, 55. Aspinwall proved a debt of 277*l.* 7*s.* 9*d.* under a commission against Moulson, exhibiting as security four bills indorsed by Moulson, and amounting together to 288*l.* 7*s.* When the first dividend was declared,

So, on the other hand, where a bill deposited is not sold, but the whole debt is proved and the bill exhibited as a security, such informality will not be allowed to prejudice the rights of the other creditors; and, therefore, whatever sums are from time to time received from other parties to the bill will be deducted from the proof, and the dividends paid on the residue only; although the bill be not then wholly satisfied. (73)

Aspinwall had received the full amount of one of the bills from the acceptor, and dividends to the amount of 18s. 6d. in the pound from the estates of two of the parties to another of the bills. Moulson's first dividend was 4s. in the pound. Aspinwall petitioned for payment of a dividend on the residue of his proofs, deducting only the amount of the bill which had been paid in full; which was ordered. Whereupon the assignees petitioned that Aspinwall might be restrained from proceeding under that order, that the proof might be expunged; or that, upon payment of the residue of the bill on which dividends had been received from other parties, the proof might be reduced to the sum which would then remain due, and that the assignees might have the benefit of Aspinwall's proofs against the other parties to that bill. Lord Eldon appears to have held, that if the assignees paid the residue of the bill on which Aspinwall had received dividends from the other parties, he would be a trustee for them in respect of any further sum which he might receive from the other parties to that bill; and if Aspinwall had received the dividends under the former order, there was no doubt the Court had authority to recall them.

(73) *Ex parte Twogood*, 19 Ves. 229. Richard and Edward Lee proved a debt of 8007*l.* under a commission against Crossley, exhibiting as securities bills they had received from Crossley, indorsed by him, for 7999*l.* Before any dividend, they received from other parties the amount of two of the bills; which amount they deducted when the first dividend was declared. They afterwards received the full amount of three, and dividends from the estate of other parties to, others

If a bill or note be holden by a creditor as a collateral security for the payment of a debt less in amount than the bill or note, he may prove the full amount of such bill or note against all the parties liable thereon, except the debtor (74); but he must not receive more than the actual debt.

of the bills; and also three dividends from the estate of Crossley. Crossley's assignees petitioned that the proof might be reduced to the sum remaining due, after deducting what had actually been received in respect of the bills; and that they might retain the amount of the dividends overpaid; contending that the bills were deposited in the nature of a pledge, and that they ought, therefore, to have been sold, and the produce deducted, and proof made for the residue. The Lees admitted that such of the bills as had been paid in full must be deducted from the proof; but they contended that, upon the residue of the proof, they were entitled to receive dividends till 20s. in the pound should be paid. Lord Eldon C. said, "The question is, whether the bills were or were not deposited as securities. Where property of a bankrupt is deposited as a security, it must be sold, and the produce deducted, and proof made for the residue; but, these bills being indorsed by the bankrupt, are *prima facie* the property of the Lees, and the proof should have been upon the bills. The indorsement is *prima facie* evidence that the bills were not given as a security, and it is for the assignees to prove that the object was security." Afterwards, Lord Eldon being satisfied, from affidavits on the part of the Lees, that the bills were not given as a security, dismissed the petition.

(74) *Ex parte King*, Cooke's B.L. 156. Davies gave his note for 500*l.* to Turner and Toye, expressed to be for value received, but, in fact, for their accommodation, and they being indebted to King in 300*l.* indorsed this note to him, to enable him to raise that sum. Turner and Toye, and Davies afterwards became bankrupt: and on petition, King was allowed to prove the whole amount against Davies's estate, and to receive dividends not exceeding 300*l.*

Ex parte Crossley, Cooke's B.L. 157. 3 Bro. Ch. Cas. 237.

Against the debtor he can prove no more than the actual debt. (71)

Where a bill is holden by a creditor as a collateral security for a debt payable with interest, he may receive, under commissions against other parties than the debtor, dividends to the amount, not only of the debt, but of the interest up to the time of full payment of the debt. (72)

Hartley being indebted to Crossley in 147*l.* 10*s.* gave him a bill for 200*l.* which had been drawn on Livesay and Co. by a partner in that house, payable to Hartley's order. The bill was accepted, but afterwards dishonoured. Livesay and Co. became bankrupts; but before a commission issued, Hartley paid Crossley 101*l.* 10*s.* in part of his debt. It appearing that Livesay and Co. had lent this bill to Hartley, the commissioners refused to allow Crossley to prove under Livesay's commission more than the balance of 46*l.* remaining due to him from Hartley. But, on petition, the Chancellor ordered the proof to be admitted for the whole 200*l.*, and dividends to be received until the petitioner should be satisfied the 46*l.* Ex parte King was relied on.

See also ex parte Bloxham, 6 Ves. 449., in which Lord Eldon C. said, "I looked upon it as settled that you cannot hold the paper of the bankrupt, and prove beyond your actual debt upon it; but that you may have the paper of third persons, those persons being indebted to your debtor in more, and you may prove to the whole amount; not exceeding 20*s.* in the pound upon the original debt."

(71) Vide ex parte Bloxham, *suprà*, and Cooke's B. L. p. 156.

(72) Ex parte Martin, 2 Rose, 87. (1814.) Martin proved, under a commission against Sharpe and Sons, a debt of 56*l.* 4*s.* 8*d.* for which he held, amongst other securities, a bill for 2450*l.* accepted for Sharpe and Sons' accommodation. He afterwards proved that bill under a commission against the acceptors. On the 12th of March 1814, when the first dividend under the

The creditor may prove the full amount of the bill against a party, who merely lent his name for the debtor's accommodation. (73)

If, upon a purchase of goods, a guarantee for the buyer deliver to the seller, as security for the payment of the purchase money, a bill or note on which such guarantee is liable, the seller will not be entitled to prove under a commission against the guarantee to a greater amount than he can prove against the purchaser, viz. the sum remaining due for the goods: for, the contract being immediate between the seller and the guarantee, the latter will be considered as standing in the same situation as the purchaser, and entitled to the

acceptors' commission was declared, the principal of the debt from Sharpe and Sons to Martin was reduced to 14*l.* 4*s.* and Martin was paid a dividend on the proof of the bill to that amount; but he claimed to receive dividends to the further amount of 86*l.* for interest up to that day; and on petition for payment of such interest, he insisted that he was entitled to interest up to the day of the dividend, until which time the debt was unliquidated; that the bill had been deposited as a security for principal and interest, and he was entitled to avail himself of it for his full and complete indemnity. The assignees of the acceptors contended that interest could not be allowed further than up to the date of the commission against Sharpe and Sons, or, at the most, up to the date of the commission against the acceptors. Lord Eldon made an order for the payment of the interest up to the day of the dividend, but offered, as it was a new case, to rehear the petition: whether he did so or not does not appear.

(73) Vide *ex parte King*, and *ex parte Crossley*, *antè*, p. 448. n. 70. See also *Cooke's B. L.* 5th ed. p. 156.

benefit of all payments by which the debt has been reduced. (74)

A person holding a joint and several security for the same debt may treat it either as a joint, or a several security, but not as both: he is bound to elect. (75)

Therefore, if two or more partners make a joint and several promissory note, the holder may prove, under a commission against them, either against their joint estate or against the separate estates of each; but he cannot prove against both.

(74) *Ex parte Reader in re Willatts*, (1819.) Buek. 381. Kearns was about to buy goods of Reader, but Reader required some person to become security for the price. Willatts consented, and Reader supplied goods to the amount of 208*l.* and Willatts became a party to bills to that amount. Willatts afterwards agreed with Reader to become security for more goods. Goods to the amount of 409*l.* were supplied, and Willatts became party to other bills to that amount. Further goods were supplied, and Willatts became party to other bills. Willatts became bankrupt, and Reader held in his hands of the bills so given by Willatts the amount of 614*l.* The debt from Kearns to Reader was reduced to 393*l.*, and whether Reader should prove for that sum or for the 614*l.* was the question. The Commissioners thought him entitled to prove for the 393*l.* only, and, on petition, Leach V.C. thought them right. "If Willatts, at the request of Kearns, and without any communication with Reader, had put his name to the bills and delivered them to Kearns, and Kearns had delivered them to Reader as a security, Reader would have been entitled to prove the full amount, and to receive dividends till his debt was paid; but, as the transaction here was immediately between Reader and Willatts, it was the same as if Willatts had been the purchaser of the goods; and then the proof against his estate could not exceed what remained due for the goods." Petition dismissed.

(75) 2 Glyn & Ja. 5, 6.

If two of the members of a firm of five carry on a distinct trade in partnership, and accept a bill drawn upon them by the firm of five (76); or if the firm of five accept a bill drawn upon them by the firm of two (77); the holder will be entitled to prove against the estates of both firms, if he took the bill without notice of the connection between the parties.

But where a single individual is liable upon a bill or note in several characters, viz, as an in-

(76) *Ex parte Adam, in re Cooke*, (Aug. 1813.) 2 Rose, 36. Five persons traded under the firm of Cooke and Co., and two of them under that of Harrison and Goss. Cooke and Co. drew a bill upon Harrison and Goss, which they accepted; and Adams, having taken it without any knowledge of any connection between the houses, and both houses having become bankrupt, he insisted that he had a right to prove it against both estates: Lord Eldon C. was of that opinion, and ordered accordingly.

(77) *Ex parte La Forest*, (April, 1797.) Co. B. L. 251. 5th ed. Whincup, Griffin, Corson, and Gordon carried on the business of soap makers, under the firm of Whincup and Griffin, at Brentford; and Corson and Gordon carried on the business of turpentine manufacturers, in partnership, also at Brentford. Petitioners discounted for Corson and Gordon a bill, drawn by Corson and Gordon upon and accepted by "Whincup and Griffin, soap manufacturers, Old Brentford." Lord Loughborough ordered, that if the petitioners knew that Corson and Gordon were concerned with Whincup and Griffin in one partnership, carried on under the firm of Whincup and Griffin, they should be at liberty to apply to the Court for further directions; but if they did not know of such partnership, they were to be admitted to prove against the respective joint estates of both firms. See 2 Glyn & Ja. 6.

dividual and as a member of a firm, the holder will not be allowed to prove against the joint estate and also against the separate estate of such individual(78); although the individual were a distinct

(78) This is stated only upon conjecture from the two following cases.

Ex parte Liddell in re Prado, 2 Rose, 34. Keys sold goods to Groves and Co., to be paid for by an approved acceptance. They gave him a bill upon De Prado, which De Prado accepted. The house of Groves and Co. consisted of Groves (an infant), Hitchcock, and De Prado; but Keys, when he took the bill, did not know that De Prado belonged to that house. Separate commissions were taken out against Hitchcock and De Prado; orders were made under each to keep separate accounts of the joint and separate estates, and to have the joint property distributed amongst the joint creditors. Keys proved under each commission as a joint creditor for goods sold, and received a dividend under each out of the joint effects. He then offered to prove upon De Prado's acceptance as a separate creditor, to get a dividend upon his separate estate, and the commissioners admitted him. But, upon petition to expunge this proof, Lord Eldon C. held it ought to be expunged: he discovered that De Prado was a partner; and then he might charge him as a partner in respect of the goods, or as an individual in respect of the bill, but not as both, and he had made his election to charge him as a partner in respect of the goods.

Ex parte Husbards, 2 Glyn & Ja. 4. (1825.) Isaac and Peter Blackburn carried on business at Liverpool, in the name of Isaac Blackburn only, and Peter carried on a separate business in London. Petitioner was holder of a bill drawn by Isaac upon, and accepted by, Peter. The bill was drawn and negotiated for the purposes of the partnership; but petitioner was not, when he took the bill, aware of the existence of the partnership. He afterwards discovered the fact, and a commission having issued against the Blackburns, he proved against the joint estate, and voted in the choice of assignees. He afterwards petitioned for leave to prove against the separate estate of Peter; or, at least, to have the proof transferred from the

trader, and the holder, when he took the bill or note was ignorant of the connection between the parties :

A fortiori, where the holder was aware of the connection between the parties (79), and the individual was not a distinct trader. (80)

joint estate to the separate estates of Isaac and Peter. At the hearing he abandoned his claim to double proof. Leach V.C. held, that the petitioner had elected, and was concluded by such election. But, on appeal, Lord Eldon C. held he was not concluded, and ordered that the petitioner should be at liberty to withdraw the proof against the joint estate, and to prove against the separate estates.

(79) *Ex parte Bigg in re Harrison*, (February, 1814.) 2 Rose, 37. Cooke drew a bill upon Harrison and Co., which they accepted. Cooke was a member of that house; and Biggs, when he took the bill, knew it. The house having become bankrupt, Bigg proved against the joint estate, and he now petitioned to be admitted to prove against the separate estate of Cooke. Lord Eldon C. thought him not entitled, and the petition was dismissed.

Ex parte Bank of England in re Graves, 2 Rose, 82. Graves, Sharp, and Fisher indorsed a bill to Fisher, a distinct trader, that he might get it discounted with the Bank. The Bank knew that Fisher was a member in the house of Graves and Co.; they discounted the bill, but made Fisher indorse it. A commission having issued against the house, the Bank insisted they had a double security, and claimed to prove against the joint estate of Graves and Co., and against the separate estate of Fisher. Lord Eldon C. held them not entitled. "In all the cases where the holder was so entitled, there had either been an ignorance of the union of the parties in one partnership, or a subdivision of them into distinct trading establishments. As to Fisher's being a distinct trader, that would only give right against his separate estate, which a creditor cannot do in bankruptcy if he resort to the joint estate. The Bank must elect."

(80) *Ex parte Bigg*, *suprà*.

And it will make no difference that the holder before he took the bill or note, required the indorsement of the individual, and thereby raised a bargain for a double security. (81)

In such case the holder may elect, whether he will prove against the joint estate or against the separate estates of the members of the firm. (82)

And though he may have proved against the joint estate and voted in the choice of assignees, he may be allowed to withdraw that proof, and prove against the separate estates. (83)

Where several distinct traders or houses of trade are concerned in a joint adventure, and for a demand, for which all are liable, one of the traders or houses gives a bill upon another of them, the payee may make separate proofs upon the bill against each of the parties to it, if separate commissions issue against them; although he knew they were jointly concerned and jointly liable. (84)

(81) *Ex parte Bank of England*, antè, p. 454. n. (79).

(82) *Ex parte Liddell*, antè, p. 453. n. (78). *Ex parte Husbands*, antè, p. 453. n. (78).

(83) *Ex parte Husbands*, antè, p. 453. n. (78).

(84) *Ex parte Walker*, and *ex parte Wenslay in re Ford*. (August, 1813.) 1 Rose, 441. Ford, a ropemaker, Price and Cross, ship brokers, and Gilbert, were jointly interested in the cargo of a ship, and jointly indebted to Wenslay and Co. in respect thereof. Wenslay and Co. knew they were jointly interested, and Ford drew upon Price and Cross in their favour, to pay them. Price and Cross became bankrupts, and Wenslay and Co. proved the bill against their estate. Ford afterwards became bankrupt, and Wenslay and Co. proved it against his estate. On petition to expunge the proofs, it was urged in

Under a commission of bankruptcy, the holder of a bill or note is not (85) entitled, (unless the bankrupt's estate should produce a (86) surplus,) to any interest or charges accrued or incurred after the commission issued; and before 6 Geo. 4. c. 16., where the act of bankruptcy to which the commission related was ascertained (87), he was

support of it, that this was not the case of one partner drawing upon the firm, but of one house of trade drawing upon another house of trade, and that that gave a double security. Lord Eldon C. assented to the distinction, and ordered the dividends to be paid.

Quære, were there not other circumstances besides those stated: there being no joint-commission, might not Wenslay and Co. have proved against each estate, even in respect of the original debt?

(85) *Anon.* 1 Atk. 140. The question was, whether the costs and charges incurred by protesting bills after a commission of bankruptcy issued could be proved; and Lord Hardwicke ordered that the costs of the protests arisen before the commission should be proved, but no part of the costs arisen afterwards.

As to re-exchange see *ex parte Hoffman*, Cooke, B. L. 173. and *Francis v. Rucker*, Ambl. 672. and as to the latter see 2 Bro. Chan. Ca. 599. It is observable that, in that case, the drawer was (in effect) allowed to prove re-exchange under the acceptor's commission. It has been held, indeed, that the acceptor is not liable for the re-exchange; vide *antè*, p. 283. Pothier (pl. 117.) expressly says that he is, in like manner as the drawer: and it seems reasonable that he should be liable to all parties where he has effects; and to all, excepting the drawer, where he has not.

(86) Vide *ex parte Mills*, 2 Ves. 295. and *Butcher v. Churchill*, 14 Ves. 573.

(87) *Ex parte Moore*, 2 Bro. Chan. Ca. 597. Previous to the 5th of May, 1785, Mrs. Tyler accepted several bills drawn upon her by Moore, and on that day committed an act of bank-

not entitled to any accrued or incurred after that act of bankruptcy.

By 6 Geo. 4. c. 16. s. 57., the holder of a bill or note whereupon interest is not reserved, over due at the issuing of a commission against any person liable thereon, may prove for interest upon the same, to be calculated by the commissioners, to the date of the commission, at such rate as is allowed by the Court of King's Bench in actions upon such bills or notes.

Mutual debts and (88) credits between a bank-

ruptcy, but no commission issued until the 9th of March, 1786. The bills became due between May, 1785, and March, 1786, and Mrs. Tyler not paying them, Moore did. He also paid 298*l.* for damages and charges, and the interest amounted to 46*l.* 10*s.* The commissioners allowed Moore to prove the sum for which the bills were drawn, but would not let him prove the interest, or the sum paid for damages and charges; upon which, he petitioned the Chancellor: but the Chancellor held, that as the time when the act of bankruptcy was committed was ascertained, he could not carry the damages beyond that time; and the petition was disallowed.

(88) *Ex parte Prescott*, 1 Atk. 230. The petitioner was a creditor for 110*l.*, and at the same time debtor to the bankrupt on a bond for 340*l.* with interest. The interest was payable annually, but the principal was not payable until March, 1756, this petition being in August, 1753. The petitioner prayed that he might be allowed to set off the 110*l.* against the principal and interest on the bond: it was objected that the bond not being yet due, these were not mutual debts. But Lord Hardwicke C. held that the case came within the expression of "mutual credit" in 5 Geo. 2. c. 30. § 28., and that that act was to be construed with reference to 7 Geo. 1. c. 31., permitting certain debts to be proved before they became due. He therefore allowed the set-off.

rupt and any other person (89), may be set off against each other under a commission of bank-

Atkinson v. Elliott, 7 Term Rep. 378. In May, 1796, Hodges bought a parcel of goods from the defendants for 430*l.*, and in September following another parcel for 230*l.*; each at six months' credit: on each occasion he gave his acceptance for the price. The first bill became due on the 6th of November, 1796, and the other on the 9th of March, 1797. On the 9th of November, 1796, in order to take up the first bill, he gave them a bill for 100*l.*, and the next day indorsed to them another for 500*l.*, taking from them a written engagement to pay over to him the surplus, viz. 170*l.* when those bills should be paid. Those bills, viz. for 100*l.* and 500*l.*, became due and were paid on the 11th of Dec. 1796. On the 13th of December, 1796, Hodges became bankrupt, and the plaintiffs, his assignees, immediately claimed the 170*l.* The defendants, however, contended that they were entitled to retain the 170*l.* in part satisfaction of Hodges' acceptance for 230*l.* though not then due; and therefore refused to pay the 170*l.* On which the plaintiffs, in Feb. 1797, brought this action for money had and received. But, on a case reserved, the Court held that this case was clearly within the authority of *ex parte Prescott*, which Lord Kenyon said was properly decided, and therefore *postea* to the defendants.

(89) By 6 Geo. 4. c. 16. § 50. it is enacted, "That where
 " there has been mutual credit given by the bankrupt and any
 " other person, or where there are mutual debts between the
 " bankrupt and any other person, the commissioners shall state
 " the account between them, and one debt may be set against
 " another, notwithstanding any prior act of bankruptcy com-
 " mitted by such bankrupt before the credit given to or the
 " debt contracted by him; and what shall appear due on either
 " side on the balance of such account, and no more, shall be
 " claimed or paid on either side respectively; and every debt
 " or demand hereby made proveable against the estate of the
 " bankrupt, may also be set off in manner aforesaid against such
 " estate; provided that the person claiming the benefit of such
 " set-off, had not, when such credit was given, any notice of an
 " act of bankruptcy by such bankrupt committed."

ruptcy, provided they accrued or were given before any act of bankruptcy has been committed by such bankrupt.

So also they may be set off, (89) notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit was given to, or debt contracted by such bankrupt; provided the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy, by such bankrupt committed.

Therefore, the amount of a bill or note cannot, in general, be the subject of set-off under a commission of bankruptcy, if the person claiming the benefit of such set-off became party to or holder of the bill or note after such act of bankruptcy, and after such notice :

Unless, perhaps, where the credit upon the bill or note forms part of a credit previously created ; as, where goods are sold upon a credit, with liberty, before the credit expires, to draw a bill or demand a note for the price.

If the holder of a bill indorse and negotiate it before, and take it up after, the bankruptcy of the acceptor, he (90) cannot set off any debt due from

(90) *Ex parte Hale*, 3 Ves. 304. The acceptor of a bill for 200*l.* became bankrupt, and Hale, who had indorsed it before the bankruptcy, was obliged after the bankruptcy to take it up, and being indebted to the bankrupt in 90*l.* he petitioned that he might be allowed to set it off. But the Chancellor said " the petitioner must pay the 90*l.* and then prove the 200*l.* There " was a debt created upon the estate and due at the time of the

him to the bankrupt against the amount of such bill; because, the right of set-off did not exist at the time of the bankruptcy.

But, if such indorser took the bill immediately from the acceptor, and advanced the money for it to him, such bill will, upon the bankruptcy of the indorser, be an item of set-off between the indorser and acceptor, if the indorser be forced afterwards to pay it; because, the acceptor had credit from him at the time he took the bill for the money he advanced upon it, and when he takes it up he is restored to the state in which he was when he originally received it. (91)

"bankruptcy, but that was not due to the petitioner; in that "respect therefore the set-off fails." The petition was dismissed so far as it sought to set off the 90*l*.

(91) Bolland and another, assignees of Marsh, Fauntleroy, and Co. v. Nash, 8 Barn. & Cr. Pasch. 105. Fauntleroy, who was a partner in the house of Marsh and Co., drew two bills upon Nash for 4000*l*. due 20th October, 1824, and Marsh and Co. discounted them for Nash: Nash accepted them payable at Marsh and Co.'s (who were his bankers); but Marsh and Co. indorsed them to Martin and Co., and became bankrupts September, 1824. Martin and Co. had money of Marsh and Co.'s in their hands, and when the bills became due paid themselves the amount. Marsh and Co.'s assignees thereupon sued Nash as acceptor, and Nash having had *more money than* 4000*l*. in Marsh and Co.'s hands when they became bankrupts, insisted he had a right of set-off under 5 G.2. on the ground that this was a case of mutual credit. On case it was insisted that Marsh and Co. had no claim against Nash till the bill was paid, which was after their bankruptcy, and that there was no credit from them to Nash till that period, and *ex parte* Hale was relied on: but the Court said, it did not appear that in *ex parte* Hale

And a bill or note may be the subject of set-off, though it do not (92) become due until after an act of bankruptcy committed.

that Hale was the drawer of the bill, or that he took it immediately from the acceptor; (and if not, there might have been intermediate parties from whom he might have enforced payment;) whereas, here the transaction was immediate between Marsh and Co. and Nash, and Marsh and Co. trusted Nash with their money upon this bill; and when the bill was taken up out of their funds, Nash was liable to their assignees for the money he had of them as for money had and received. *Postea* to defendant.

(92) *Ex parte Wagstaff*, 15 Ves. 65. A commission of bankruptcy issued against the Kershaws on the 29th of June, 1804. At that time Wagstaff was a creditor for 2277*l.* and he had accepted a bill drawn on him by the bankrupts for 399*l.*, which became due and was paid by Wagstaff, on the 5th of July, 1804. He was at the same time debtor to the bankrupt in 363*l.*, the greatest part of which was for goods sold on a credit which did not expire until the 1st of May, 1805: the residue was for money had and received. He claimed to be allowed to prove his debt of 2277*l.*, contending that he had a right to set off the 363*l.* against the 399*l.* on the acceptance, though not due until after the bankruptcy. The commissioners, however, refused to allow the set-off. But Lord Erskine C., on petition, ordered the set-off to be allowed, and said that this was mutual credit to all intents and purposes. See *ex parte Prescott, and Atkinson v. Elliott*, *antè* p. 458. note (88).

CAP. XI.

Of the Evidence necessary to entitle the Plaintiff to recover upon a Bill or Note.

What must be proved against the Acceptor — Drawer — Maker — Or Indorser, p. 462 to 474.

What Proof is superseded by Offers to give Security, p. 474.
 ————— *by part Payment, or Promise to pay, p. 474.*

————— *by asking indulgence, p. 478.*
Proof of Signature — what sufficient, p. 479.

————— *Confession by Co-Defendant, p. 479, 480. 483, 484.*

————— *Payment of similar Bills, p. 484.*

————— *in case of Signature by Servant — or Partner, p. 484.*

Proof of Notice, p. 485.

————— *on Protest, p. 487.*

————— *on Judgment by Default, p. 487.*

Of referring Action on Bill or Note to an Officer of the Court to compute what is due thereon, p. 488.

TO recover in respect of a bill or note upon a count for money lent, money paid, or money had and received, the plaintiff must prove such of those facts, (if they are not admitted,) as he ought to state upon a special count; and upon a special count, he must prove such of the facts which are not admitted as appear upon the face of that count necessary to maintain the action.

An acceptance admits the (1) ability of the drawer to make the bill, and if made after sight of

(1) *Porthouse v. Parker and others*, 1 Camp. N. P. C. 82. This was an action by the payee against the drawers of a bill.

the bill, his (2) signature; an indorsement admits the ability and (3) signature of every antecedent party.

The bill purported to have been drawn by Wood as agent of the defendants, upon John Parker one of the defendants. There was no proof of Wood's authority; but it was proved that the bill had been accepted by the agent of John Parker, the drawee; and Lord Ellenborough held that the bill having been accepted by order of one of the defendants, this was sufficient evidence of its having been regularly drawn.

(2) *Wilkinson v. Lutwidge*, Str. 648. In an action against the acceptor of a bill, Raymond C. J. allowed the plaintiff to read the bill without proving the drawer's hand; because, he thought the acceptance a sufficient acknowledgment on the part of the defendant; but he said it would not be conclusive; and if the defendant could show the contrary, the reading the bill should not preclude him. See *Cooper v. Le Blanc*, post 479. note (31).

Jenys v. Fowler, Str. 946. In an action against the acceptor of a bill, Raymond C. J. held it was not necessary for the plaintiff to prove the drawer's hand, and on the defendant's offering to call witnesses to swear they believed it was not the drawer's hand, the Chief Justice would not admit the evidence, and he inclined strongly that actual proof of forgery would not excuse the defendant.

See *Price v. Neale*, antè, p. 318. and *Smith v. Mercer*, antè, p. 319.

(3) *Lambert v. Pack*, Salk. 127. Lord Raym. 443. 12 Mod. 244. Holt, 117. In an action against the indorser of a bill, Holt C. J. ruled that it was not necessary to prove the drawer's hand; for, though the bill was forged, the indorser would be liable.

Williams v. Seagrove, 2 Barnard. B. R. 82. A rule was made absolute for delivering up a note to an indorsee, though it was proved to have been forged; upon the ground that he might notwithstanding bring actions upon it against the indorsers. See also Str. 442.

But an acceptance, though made after sight of an indorsement, does not admit the ability or (4) signature of the indorser.

Critchlow v. Parry, 2 Campb. N. P. C. 182. Indorsee against the indorser of a bill. The plaintiff was the immediate indorsee of the defendant. The declaration stated several prior indorsements, and the question was, whether it were necessary to prove them. Lord Ellenborough held the proof unnecessary, and the plaintiff had a verdict.

(4) *Smith v. Chester*, 1 Term Rep. 654. In an action by the indorsee of a bill against the acceptor, the plaintiff was nonsuited because he could not prove the hand-writing of the first indorser, though the indorsement was on the bill at the time of the acceptance. A motion was made to set aside the nonsuit, on the ground that, as the indorsement was on the bill when it was accepted, the acceptance admitted it; but, the Court thought it did not; because, the acceptor only looks to the hand-writing of the drawer, and *that* he is afterwards precluded from disputing. Rule discharged.

Carvick v. Vickery, Dougl. 630—653. n. (134), antè, p. 52. note (21). A bill payable to the order of father and son, who were not partners, was indorsed by the son only, after which it was presented, and the drawee wrote upon it a direction to his banker to pay it. In an action against the drawee the question was, whether the indorsement by the son alone was sufficient? and Willes J. inclined to think the order to the banker was a recognition of the indorsement; but Ashhurst and Buller Js. thought not. However, in *Hankey v. Wilson*, Say. 223. in an action by the indorsee of a bill against the acceptor, there was no actual proof of the hand-writing of one of the indorsers, but it appearing that the indorsement was upon the bill when the defendant accepted it, and that he promised to pay it, Ryder C. J. left the case to the jury, who found for the plaintiff; and upon a rule to show cause why there should not be a new trial, the Court thought it a question for the jury, Whether the acceptance and promise did not amount to an admission that the name of every indorser was authentic? and refused the rule.

Nor does it admit the indorsement of the drawer where the bill is payable to the drawer's order. (5)

And if such bill import to be drawn and indorsed by procuration, though the acceptance admit the procuration as to the drawing, it does not as to the indorsement. (5)

But upon a bill payable to the drawer's order, an acceptance admits the drawer's ability to indorse; for if he cannot indorse, he was not of ability to draw. (6)

It precludes the acceptor, therefore, from relying upon infancy in such drawer and indorser. (6)

So if a bill be drawn in the name of a firm purporting to consist of several persons, the acceptance admits that there is such a firm (7):

(5) *Robinson v. Yarrow*, 7 Taunt. 455. Action by indorsee against acceptor on bill importing to be drawn by Henry, per procuration for Stachen and Co., payable to the order of Stachen and Co., and to be indorsed by Henry per procuration for Stachen and Co. Plaintiff proved the acceptance, but he did not prove Henry's signature to the indorsement, nor his authority to indorse, upon which Burrough J. directed a verdict for defendant; and on rule nisi for new trial, and cause shown, the Court held the acceptance admitted Henry's authority to draw, and his signature as drawer, but that it was no admission of his authority to indorse, or of his indorsement; for, the drawing and indorsing would have contrary effects, the one would bring the amount to Stachen and Co., the latter would carry it from them: rule discharged.

(6) See *Taylor v. Croker*, ante p. 45. n. (3).

(7) *Bass v. Clive*, 4 M. & S. 13. Indorsee against acceptor on bill purporting to be drawn by Ellis, Needham jun., and Co., and payable "to our order." Plaintiff declared upon it as

And that it consists of several. (7)

And the acceptor will be precluded from proving the contrary, if it be only to let in a technical objection. (7)

In an action, therefore, against the acceptor of a bill or maker of a note, the plaintiff must prove the defendant's signature, and the necessary indorsements; and in the former case, if the acceptance were made without sight of the bill, the signature of the drawer: in an action against the drawer of a bill, or the indorser of a bill or note, he must prove the defendant's signature; the necessary indorsements (8) between the defendant and the plaintiff, the presentment; the non-acceptance or nonpayment; the notice of dishonour (or the facts to show such notice unnecessary); and, in the case of a foreign bill, the protest.

In an action, indeed, against the drawer (9) or

drawn by certain persons trading under the firm of Ellis, Needham jun., and Co., and payable to their own order; defendant proved at the trial that only one person constituted that firm, upon which Lord Ellenborough nonsuited, with liberty to plaintiff to move to enter a verdict. On rule nisi *indè* and cause shown, he and the rest of the Court were clear that by the acceptance defendant had admitted conclusively that there was such a firm as that stated on the face of the bill, and was not at liberty to prove the contrary: rule absolute.

(8) Vide *Critchlow v. Parry*, *antè*, p. 464. n. (3).

(9) *Waynam v. Bend*, 1 Campb. N. P. C. 175. In an action against the maker of a promissory note payable to T. L. or bearer, the declaration averred an indorsement by T. L., and Lord Ellenborough held that the plaintiff, having stated such

acceptor of a bill, or the maker of a note, all the indorsements stated, though some may have been stated unnecessarily, must be proved; but against an (10) indorser, the defendant's indorsements, and such indorsements only as are stated to have been made subsequently to his, need be proved.

In proving indorsement by payee, it is not sufficient to prove that a person pretending to be payee indorsed it; there must be some evidence of his being payee. (11)

indorsement, though unnecessarily, was bound to prove it. See also *Smith v. Chester*, *antè*, p. 464. n. (4), and *Bosanquet v. Anderson*, 6 Esp. N. P. C. 43.

(10) See *Critchlow v. Parry*, *antè*, p. 464. n. (3).

(11) *Bulkeley v. Butler*, Hil. 1824, 2 B. & C. 434. In an action by indorsee against acceptor, on bill of 6th August 1816, at thirty days' sight, payable to Edmund Shanahan or order, dated Lisbon, the bill was produced with an indorsement in the name of Edmund Shanahan; and to prove the indorsement, plaintiff's clerk was called, who proved that on 19th August 1816, a person calling himself Edmund Shanahan produced the bill to plaintiff at Cadiz, and wrote the indorsement upon it on the 20th; that at the same time on the 19th he produced two other bills, one for 640*l.*, which the clerk knew to be a genuine bill, drawn by M'Donnell and Co. of Lisbon; that this person first called on plaintiff 10th August, and produced a genuine letter of recommendation from M'Donnell and Co. describing the bearer as Edmund Shanahan, and that that person dined at plaintiff's every day from 6th August to the 19th, and that he took a letter of credit from plaintiff, in the name of E. Shanahan, on Gibraltar. The action was at issue in Hilary 1817, but not tried till July 1820. At the trial it was insisted that there was no evidence that the person who indorsed was Edmund Shanahan, or the payee; and Dallas C. J. being of opinion that there was, a bill of exceptions was tendered; and

His possession of the bill at the time he indorsed it is evidence of his being payee: for if he were not payee, he would have no right to such possession. (11)

But such possession, though admissible in evidence to ground the presumption of his being payee, only furnishes a presumption for the consideration of a jury. (11)

And it may be strengthened, on the one hand (11);
And impeached, on the other. (11)

Possession by the party, at the time he indorses the bill, of a genuine letter of recommendation from a correspondent of the indorsee, giving him the same description as the bill gives the payee, tends to strengthen the presumption. (11)

The presumption will be greater or less according to the probability of being able to impeach it, if not well founded. (11)

upon argument, it was very strenuously pressed that the evidence was inadmissible to this point, and insufficient to prove it: but the Court thought clearly that the evidence was admissible and sufficient; that the possession of the bill, to which no person but Edmund Shanahan, the payee, or some one claiming under him, was entitled, was, whilst unexplained and unimpeached, *prima facie* evidence that he was Edmund Shanahan, the payee; that the possession of the letter of recommendation which no one but Edmund Shanahan could rightly have had, was, whilst unexplained and uncontradicted, *prima facie* evidence that he was Edmund Shanahan; and if this evidence were admissible, there was so much time for the right Edmund Shanahan to have come forward if this person were not the right Edmund Shanahan, and there were so many persons who could

In an action against the drawer or indorser of a bill, the acceptance, though stated, need not, in general, be proved. (12)

But if a bill, in consequence of having an acceptance upon it pointing out a particular house for payment, be presented there for payment, and not at the drawee's residence or personally to the drawee, such acceptance must, in general, be proved in an action against the drawer or an indorser; because, otherwise, the presentment at that particular house will not be a valid presentment. (13)

But, if it can be shown that such acceptance was upon the bill when the defendant passed it, proof of the acceptance will be unnecessary. (13)

Proof that it was upon the bill when the plaintiff took it, if he did not take it immediately from the defendant, will not be sufficient. (13)

Where plaintiffs have no title upon a bill or note,

naturally be able to prove who was the right Edmund Shannah, if this were not, that no doubt could be entertained of the sufficiency of the evidence : judgment affirmed.

(12) *Tanner v. Bean*, ante, p. 392. n. (124).

(13) *Smith v. Bellamy*, 2 Stark. 223. Second indorsee of bill against payee, on bill drawn on Stevenson, payable in London, with an acceptance thereon payable at Spooner and Attwood's. It had been presented there and there only. The acceptance was upon the bill when the plaintiff took it, but there was no evidence that it was so when defendant indorsed it and passed it away : it was urged that the jury might presume it was on the bill when plaintiff took it ; Lord Ellenborough thought not, and as proof of the acceptance was necessary to make the presentment valid, he nonsuited the plaintiff.

unless they constitute a particular firm, they must prove that they constitute that firm :

As, if they sue upon a bill or note, payable to that firm by its name of business, without specifying its members ;

Or specially indorsed to it.

But though several persons join in suing as indorsees, yet if they claim under an indorsement in blank they need not show that they are partners, or that they have a joint interest. (14)

It is, indeed, stated to have been held, that where a bill indorsed in blank is sent to a particular house, and an action is afterwards brought thereon by some of the members of that house and additional parties, there must be some evidence that that house transferred the bill to the plaintiffs, or consented to their suing upon it (15) :

(14) *Ord v. Portal*, 3 Campb. 239. Three persons sued as indorsees on a bill ; the indorsement to them was in blank : it was urged that it ought to be shown that they were partners, or had a joint interest. *Sed per Lord Ellenborough*, " It is not necessary ; the indorsement in blank gives a joint right of action to as many as agree in suing." Verdict for plaintiffs.

Rordasnz v. Leach, 1 Stark. 446. Two persons sued as indorsees ; the indorsement to them was in blank : and on question whether they were bound to show a joint title, Lord Ellenborough held they were not.

(15) *Machell, Boucher, and Birkbeck v. Kinnear*, 1 Stark. 499. Plaintiffs were trustees of the estate of Holder, an insolvent ; two of them were partners in the house of Langton and Co. : defendant, being indebted to Holder, sent a bill indorsed in blank to Langton and Co. on account of Holder's estate : the trustees sued thereon ; but on an objection that

And this, though the bill were sent to the house for the benefit of the persons who sue. (15)

And in many cases the plaintiff is compellable to prove that either he or some preceding party took the bill or note *bonâ fide*, and for value;

As, in case of a bill or note originally given without consideration, and whilst the person giving it was under duress (16):

Or in case of a bill or note obtained by fraud (16):

Or in case of a transfer by delivery by a person not entitled to make it (18):

Langton and Co. did not appear to have transferred the bill to the plaintiffs, or to have sanctioned their suing thereon, Lord Ellenborough held that proof essential, and nonsuited the plaintiffs.

(16) *Duncan v. Scott*, 1 Camp. N. P. C. 100. Indorsee against the drawer of a bill. It appeared that the defendant gave the bill while under duress abroad, and under a threat of personal violence and confiscation of his property, and that it was given without consideration. Lord Ellenborough held that the defendant not having been a free agent when he drew the bill, it was incumbent on the plaintiff to give some evidence of consideration; and no such evidence being given, the plaintiff was nonsuited.

(17) *Rees v. Marquis of Headfort*, 2 Campb. N. P. C. 574. In an action by an indorsee of a bill against the acceptor, it appeared that the drawer had received no consideration for the bill, and had been tricked out of it by a gross fraud; and Lord Ellenborough held that this made it incumbent on the plaintiff to show what consideration he gave for the bill; and the plaintiff not being prepared to do so, was nonsuited.

(18) Vide post, Chap. XII. where the cases as to stolen or lost bills are collected.

As, in the instance of bills or notes which have been stolen or lost. (18)

To compel a plaintiff, however, to give such proof, it may be prudent, and has been held necessary, to apprise him before the trial that such proof would be required from him. (19)

But though the neglect be proper for the consideration of a jury, and may be pressed upon them as a ground for distrusting the evidence that may be given upon the point, there is no legal principle which will warrant a judge in rejecting evidence offered by the defendant to make such evidence on the part of the plaintiff necessary, or in telling a jury they may disregard it. (20)

If two traders at distant places be in the habit of remitting to each other bills taken by the one, and payable in the place where the other resides, to take advantage of the exchange, and they

(19) *Paterson v. Hardacre*, 4 Taunt. 114. In an action by indorsee against acceptor, the defence was, that an agent employed by defendant to get the bill discounted had appropriated it to his own use, and absconded: it was urged, upon this, that plaintiff was bound to prove how he got the bill, and what consideration he gave for it; he was not prepared with such proof, and was allowed to take a verdict subject to the question, whether he was bound to give it; and on rule nisi for a nonsuit on this ground and time to consider, the Court held that where such a defence was contemplated, it was incumbent on the defendant to give distinct notice to the plaintiff that such proof would be called for at the trial; and because no such notice had been given, the rule was discharged.

(20) See *Wyatt v. Campbell*, 1 Mood. & Malk. 80.

divide the profits between them ; if one take a stolen bill or note, and remit it, and the other sue upon it, he must give the same evidence of its having been taken for value and with proper caution as the person remitting it must have given. (21)

Especially, if each be answerable for the paper he remits.

And it will make no difference, that the balance between them when the bill was remitted was and still is in favour of the plaintiff to more than the amount of the bill or note.

At least, if plaintiff made no further advance, and gave no further credit than he would have done had the remittance not been made. (21)

(21) *De la Chaumette v. Bank of England*, 9 Barn. & Cr. 208. Plaintiff lived in London ; Odier and Co., in Paris ; and Odier and Co. used to remit to plaintiff bills, &c. payable in London, and plaintiff to remit to Odier and Co. bills payable in Paris, that they might take the advantage of the exchange ; and at the end of each year they divided the profits : each was answerable for the paper he transmitted. Odier and Co. transmitted a 500*l.* Bank of England note, but such note having been stolen from one Haselton, the bank stopped it : plaintiff brought trover, and it appeared that at the time this note was sent the balance against Odier and Co. was 1700*l.*, and that it was still 900*l.* Lord Tenterden, however, thought plaintiff identified with Odier and Co., and that unless they could recover he could not, and he left it to the jury, whether Odier and Co. took it in the ordinary course of business. The jury found for plaintiff ; but there having been no proof, of whom or under what circumstances Odier, and Co. took the note, the Court granted a new trial, that plaintiff might give evidence upon these points. The other Judges agreed that plaintiff stood in

It has been laid down in (22) some cases, that in an action against the indorser of a bill, the plaintiff must prove an application to the drawer for payment; but it (23) is now fully settled he need not.

And an offer, after the bill or note has become due, to give the holder another bill in lieu of it, is an (24) admission of the holder's title, so as to supersede the necessity of proving the indorsements or other special facts.

So, (25) part payment of a bill or note after it

the same situation as *Odier and Co.*: he had made no further advance or given any further credit upon the remittance of this note.

(22) *Vide Burr.* 671.

(23) This was decided after two arguments in the case of a foreign bill in *Bromley v. Frazier*, Str. 441.; and in the case either of a foreign or inland bill, (but which does not appear,) in *Lawrence v. Jacob*, Str. 515.; and in the case of an inland bill, *Heylin v. Adamson*, Burr. 669.

(24) *Bosanquet v. Anderson*, 6 Esp. N. P. C. 43. Indorsee of a bill against the acceptor. The bill was drawn in favour of the drawer, who had indorsed it; and his indorsement and several others were stated in the declaration. The plaintiff proved the first indorsement, and that when the bill became due, the defendant, being unable to take it up, came to the plaintiff and offered another in lieu of it. Lord Ellenborough held that this was an admission of the plaintiff's title, and dispensed with the proof of the several indorsements.

(25) *Sidford v. Chambers*, 1 Stark. 326. Plaintiffs sued as indorsees of *Niblock and Co.*; who were indorsees of *Sheckles*, to whom defendant had indorsed: they could not prove the indorsement of *Sheckles*, but they proved a letter from defendant to plaintiffs offering to substitute another bill, saying they had not money to take up the bill in question, and expressing a hope that it was not in the hands of *Niblock and*

has become due, without any objection being made for want of notice, or a (26) promise to pay,

Co. Lord Ellenborough thought this evidence of the channel through which the bill had passed to plaintiffs, and made proof of the indorsement by Sheekles unnecessary; and plaintiff had a verdict.

Horford v. Wilson, 1 Taunt. 12. In an action by the indorsee against the drawer of a bill, which had been dishonoured by the acceptor, it appeared that the defendant had paid part of the money due upon the bill, without making any objection for want of notice of the dishonour; and the Court held, upon a motion for a new trial, that from this the jury were warranted in presuming that due notice had been given.

(26) *Lundie v. Robertson*, 7 East's Rep. 231. Indorsee against an indorser of a bill. No evidence was given of presentment or notice; but it was proved that on being called upon by the plaintiff's clerk some months after the bill was due, the defendant said, "he had not the cash by him, but if the "clerk would call in a day or two, and bring the account " (meaning 'of the expenses') he would pay it;" the bill was shown him at the time. On a second application, he offered a bill on London for the debt and expenses, which was refused: he then said that "he had not had regular notice, but as the "debt was justly due he would pay it." *Chambre J.* thought this sufficient; and verdict for the plaintiff. On a rule nisi for a new trial, and cause shown, Lord Ellenborough said, "the "case admits of no doubt: it was to be presumed *prima facie* "from the promise to pay that the bill had been presented "in time, that due notice had been given, that no objection "could be made to payment, and that every thing had been "rightly done; this superseded the necessity of the ordinary "proof: the other conversation does not vary the case; for, "though the defendant said he had not had notice, he waived "that objection." Rule discharged.

See *Gibbon v. Coggon*, 2 Campb. N. P. C. 188., where, from the drawer's promising to pay a bill, Lord Ellenborough directed the jury to presume that it had been duly protested. See also *Taylor v. Jones*, 2 Campb. N. P. C. 105.

furnish grounds from which a jury may presume that it has been properly presented, that notice has been duly given, and that a protest (where necessary) has been made.

And such presumption may be made (27),

Greenway v. Hindley, 4 Campb. 52. In an action by the indorsees of a foreign bill against the drawer, it was proved that long after the bill became due defendant called on the holder, and said he came to arrange the payment; and on being shown it, added, "it was regular; it was due from him and his partner, and that he was come to arrange for paying principal and interest." The declaration having alleged presentment and protest, it was urged that evidence ought to be given upon these points; but Lord Ellenborough said the defendant's acknowledgment was a sufficient foundation from which the jury might infer those facts; and verdict for plaintiffs.

Hodge v. Fillis, 3 Campb. 463. A bill was made payable in London, and accepted payable at Sir John Perring and Co.'s; and in an action against the acceptor, plaintiff had alleged presentment at Sir John Perring's, but could not prove it; Lord Ellenborough held the proof essential, unless there were something to dispense with it: plaintiff then proved that after the bill was due defendant promised payment, and Lord Ellenborough thought that made the other proof unnecessary; and verdict for plaintiff.

Wood v. Brown, 1 Stark. 217. In an action against the drawer of a bill, plaintiff proved a letter from defendant after the bill was due, in which he said he was an accommodation drawer only, and that the bill would be paid before the following term; Lord Ellenborough held that this made proof of notice of the dishonour unnecessary, and the plaintiff had a verdict without such proof.

(27) *Potter v. Rayworth*, 13 East's Rep. 417. Indorsee of a note against the payee and indorser. It appeared that the note (which had been negotiated in the country) had been indorsed by the defendant to Fulford, by him to the plaintiff, by the plaintiff to Kirton, and by him to others, before it became

though the promise were not made to the plaintiff or in his presence, but to a subsequent indorsee who then held the bill or note : or to a prior indorser, who had not taken it up. (28)

And an agreement with a prior indorser, to pay the amount by instalments, is evidence, in favour of a subsequent indorsee, that the party agreeing to

due. A fortnight after it had become due, Kirton, who had taken it up, called on the defendant, who until then had received no notice of its dishonour : the defendant then promised Kirton to pay him the next day ; having failed in this, Kirton resorted to the plaintiff, who paid the amount ; and the defence now being the want of notice, the question was whether the plaintiff could avail himself of this promise so made to Kirton. Graham B. directed a verdict for the plaintiff ; and on motion to set it aside, the Court (Grose and Le Blanc Js. absent) held that this promise was an acknowledgment by the defendant, either of notice, or that without notice he was the proper person to pay the note, and refused the rule.

(28) *Gunson and others, assignees of Golding v. Metz*, 1 Barn. & Cr. 193. Action against drawer on a bill indorsed by Kinnear to Golding. Plaintiffs proved the presentment, but, instead of proving notice to defendant, they proved an agreement between him and Kinnear eight months after this bill became due, which stated, that defendant had drawn and indorsed various bills, which were specified, one of which was the bill in question, and that they were or ought to be in Kinnear's hands, and then stipulated for payment by weekly instalments. Abbott C. J. thought this agreement evidence against defendant that he was liable, when the agreement was made, upon that bill, and consequently that he had previously received due notice of its dishonour ; and on motion for new trial, the Court agreed with him ; for, had defendant been discharged by want of notice when he made the agreement, he would have insisted upon his discharge ; he would not have agreed to pay the bill. Rule refused.

pay these instalments, had received due notice of the dishonour. (28)

Though there have been no due presentation, yet if there have been a subsequent application from an indorser for indulgence, it is for the jury to consider whether at the time of the application the indorser did not know there had not been a due presentation. (29)

A nonsuit, without leaving that point to the jury, is improper. (29)

If there have been laches in not giving notice, an indorser who may be prejudiced thereby in his remedies over against other indorsers, will not be precluded from insisting on such laches by having desired that the bill may be sent to him or some other person he names as soon as he receives notice; unless the bill when so sent be kept an improper time. (30)

(29) *Hopley v. Dufresne*, 15 East, 275. Indorsee against indorser; the bill was accepted payable at Hammersley's, and there was no proof of presentment there till after the banking-hours; but after the declaration delivered, defendant had applied to plaintiff for further time to pay the bill: nonsuit, on the ground that no sufficient presentment was proved; but on rule nisi for new trial, and cause shown, the Court thought it should have been left to the jury to say, whether at the time of his application for time defendant did not know there had been no due presentation: and on that account, rule absolute.

(30) *Borradaile v. Lowe*, 4 Taunt. 93. Bill due 19th January; defendant was fifth indorser, Trever and Co. the fourth; 25th January, letter to defendant that it was dishonoured, with reasons assigned for not writing sooner: defendant wrote for answer, "I cannot think of remitting till I receive the draft;

A confession of his signature is sufficient evidence (31) against the party making it, but (32)

“therefore, if you think proper, you may return it to Trever and Co., if you think me unsafe.” It was accordingly sent to Trever and Co., but they returned it in a few days, saying, they had applied to the third indorser, and received it back from him as out of time; and as the delay was with plaintiff, they thought themselves and defendant discharged. Action indèlaches in plaintiff was admitted, but defendant’s letter was relied upon as an answer; the distinction between the situation of an indorser, whose remedy over may be lost by the holder’s laches, and of a drawer, was strongly relied on for defendant; and on rule nisi for nonsuit, and cause shown, Mansfield C. J. said, “this letter contained no express promise to pay at all ‘events,’ and he thought it would be too much to fix defendant here: in most cases where a defendant had been held liable there had been an express promise to pay, or a promise under full knowledge of being discharged, or a debt, binding in conscience, due from defendant. Rule absolute.

(31) *Cooper v. Le Blanc*, Str. 1051. The plaintiff, on discounting a note, sent to the defendant to know whether an indorsement upon it was his, and the defendant said it was, and the note would be paid when due: he would notwithstanding have given evidence by similitude of hands that the indorsement was a forgery; but Lord Hardwicke would not allow it: he seemed inclined, however, to admit proof of actual forgery; but the defendant could not adduce it, and the plaintiff had a verdict. See *Wilkinson v. Lutwidge*, antè, p. 197. n. (51). p. 463. n. (2).

Leach v. Buchanan, 4 Esp. N.P.C. 226. The plaintiff, before he took a bill, sent a person with it to the defendant to enquire whether the acceptance upon it were his handwriting; the defendant said that it was, and that it would be duly paid. He now offered evidence of the actual forgery of the acceptance; but Lord Ellenborough held that that proof would not discharge the defendant; that after having so accredited the bill and induced a person to take it, he was bound to pay it. Verdict for the plaintiff.

(32) *Hemmings v. Robinson*, Barnes, 3d ed. 436. In an action

not against any other party; and it is (33) sufficient, though made pending a treaty for a compromise.

A confession by the person who was holder of a bill or note when it became due, is evidence against any person to whom he may afterwards indorse it. (34)

A confession by the person on whose account and for whose benefit plaintiff sues is evidence against plaintiff; unless plaintiff disclaim suing on that person's account. (35)

by the indorsee of a note against the maker, it was reserved as a point whether the acknowledgment of an indorser was sufficient evidence to prove his indorsement; and the Court held it was not. See *Gray v. Palmer*, post, p. 483. n. (41).

(33) *Waldridge v. Kennison*, *Espinasse*, 149. In an action against two as acceptors of a bill, the only evidence of the signature by one was an admission he made pending a treaty for settling the cause: it was objected that this admission ought not to be received in evidence, because it was made under the faith of a compromise; but Lord Kenyon held that the admission of a handwriting might be received in evidence, though it was made under faith of a compromise; and he admitted it accordingly.

(34) *Anon. Lancaster Assizes*. A bill payable to the drawer's order was indorsed by him after it became due. Evidence was offered by defendant as to what the drawer had said respecting the bill; it was objected to, but Holroyd J. admitted it: he said "shifting the possession after the bill became due was not to vary the defendant's condition: plaintiff stands to all intents and purposes in the condition of the person who held it when it became due, and that was the drawer."

(35) *Shaw v. Brome*, B. R. Trin. 1824. In an action by indorsee against acceptor, defendant proved that the bill was indorsed to plaintiff to indemnify him against being bail; that he

But before such confession is admitted in evidence, plaintiff has a right to have it proposed to him, if it can be matter of doubt, whether he does or does not sue on that person's account. (36)

And, in general, a confession by the holder of a bill or note before it became due is no evidence against a person who took it *bonâ fide* and for value before it became due. (36)

Against a person who gave no value for it, or took it *malâ fide*, the declarations of the person from whom he took it, or of a prior party, may be evidence. (37)

had not been, and could not now be, damnified : defendant then offered in evidence declarations by the person who had indorsed the bill to plaintiff, on the ground that plaintiff must be suing as trustee for him, and on his account : the admission of these declarations was objected to, but they were received. On motion, the Court thought it should have been put to plaintiff, to say whether he was suing for the indorser's benefit, and that, until that question was put and answered, the declarations could not properly be received.

(36) *Smith v. De Wruit*, 1 Ryan & Moody, 212. In an action by indorsees against acceptor, defendant offered to prove declarations by the drawer, made whilst he held the bill ; but, the indorsement to plaintiffs appearing to have been before the bill was due, and there being nothing to impeach the plaintiff's title, Abbott C. J. rejected the evidence : upon other proof, however, there was a verdict for defendant.

(37) *Pocock v. Billings*, 1 Ryan & Moody, 127. In an action by indorsee against acceptor, the defence was, that the drawer had negotiated the bill after he became bankrupt, and that neither plaintiff nor any of several other indorsers had given value for it ; and the declarations of an indorser whilst he held the bill were offered in evidence. Best C. J. admitted them,

Proof of the signature by a person who has no knowledge of the handwriting, except from having seen the party once write his name, may be sufficient, if the party then wrote his name at length (38);

Or as much thereof as the signature to be proved contains (38):

Otherwise, it is not sufficient. (38)

In an action against the drawer of a lost bill, Holt C. J. (39) held proof, that the defendant owned he had made the bill, sufficient.

as declarations against his own interest; and likened them to declarations by the owner of an estate during his possession.

N. If there were previous proof to impeach plaintiff's title, and that of all the intermediate parties, between him and the indorser whose declarations were offered in evidence, the declarations were, perhaps, rightly admitted. The holder of a bill stands in a very different situation from the owner of an estate: the latter can have no title, unless the person from whom he took had: the former, on the ground of a bill or note being negotiable, may.

(38) *Powell v. Ford*, 2 Stark. 161. To prove an acceptance, in which the defendant wrote his Christian name at length, plaintiff called a witness who had no other knowledge of defendant's handwriting but from having once seen him sign his name, where he put the initial only for his Christian name, "M. Ford." Lord Ellenborough thought his evidence might have been sufficient, had he ever seen defendant write his name at length; but that as he had never seen him write his Christian name, the Christian name could not be inferred to be genuine from evidence as to the surname, any more than proof by a person who had seen him write some only of the letters which occurred in the surname could be competent to prove the whole surname. Nonsuit.

(39) This was the case of *Hart v. King*, 12 Mod. 309.

So, in an action against an indorser, proof that the defendant admitted to have received a bill corresponding with that upon which the action was brought, that after issue joined he had declared that he came to town to hasten the trial of a cause brought against him on an indorsement he had made upon a bill, and that he carried the cause down by proviso, was (40) held sufficient.

In an action against several drawers, indorsers, or acceptors, an admission upon the pleadings by one of his signature will (41) not exempt the plain-

(40) *Dale v. Lubuck*, 1 Barnard. B. R. 199. In an action against an indorser the evidence was, that he had written a letter stating that he had received a bill from A. upon B. bearing date such a day, and payable to him or order six months after date (in all which circumstances the bill stated in the letter corresponded with the bill declared upon), but not mentioning the sum; that he had said he came up to town to hasten on the trial of an action brought against him on an indorsement he had made upon a bill, and that, in fact, he carried down the cause by proviso; and Raymond C. J. held this sufficient evidence to prove that the defendant indorsed the bill stated; and the jury found for the plaintiff.

(41) *Gray v. Palmer, Espinasse*, 125. Action against James Palmer, John Palmer, and Hodgson, as makers of a note; Hodgson pleaded a judgment recovered, and each of the Palmers, non-assumpsit: upon the trial on the non-assumpsit, the plaintiff proved the subscription by each of the Palmers, and there rested his case. The Palmers contended that he ought to prove Hodgson's subscription also, but the plaintiff insisted that *that* was admitted by the plea of nul-tiel record. Lord Kenyon, however, held that it was only admitted as against Hodgson, not against the Palmers, and that the plaintiff could not recover against them without proving it.

tiff from proving it against the others, if they contest it.

Though a person sued as acceptor of a bill prove that the acceptance was forged, yet if it appear that he and the party who committed the forgery had been connected in business, and that the defendant had paid other bills drawn by such party and accepted similarly to that on which the action is brought, it will be sufficient; because, it shows that he (42) had sanctioned such acceptances, and rendered himself liable to pay them.

The signature of a partner or servant, importing to have been made on the partnership or master's account, is to be considered as the signature of the (43) partnership or master.

On a signature by a servant, the servant's authority must be proved.

An authority by parol is (44) sufficient.

(42) *Barber v. Gingell*, 3 Esp. N.P.C. 60. In an action against the defendant as acceptor of a bill, he proved that the acceptance was forged by Taylor the drawer; in answer to which it was proved that the defendant had been connected in business with Taylor, and that he had paid several bills drawn as the present by Taylor, and to which Taylor (as it was supposed) had written the acceptances in the defendant's name. And Lord Kenyon held that this was an answer to the case of forgery set up by the defendant; for, though he might not have accepted the bill, he had adopted the acceptance, and thereby made himself liable to pay the bill. Verdict for the plaintiff.

See *Gibson v. Hunter*, 2 H. Bl. 288.

(43) Vide *Pinkney v. Hall*, Lord Raym. 175., *Smith v. Jarvis*, Lord Raym. 1484., *Carvick v. Vickcry*, Dougl. 630. n. 134.

(44) 12 Mod. 564.

Subsequent assent is (45) evidence of precedent authority.

Usual employ is evidence (46) of a general authority; and a general authority is supposed to continue until its determination is notorious.

Therefore, after the discharge of a servant usually employed, a (47) man will be bound by his signature until his discharge is generally known.

The clerk who signs bank notes need not have authority for the purpose under the common seal of the Bank. (48)

And now, by 1 G. 4. c. 92. s. 3., his signature may be impressed by machinery.

Where notice is sent by the post, proof of putting the letter into the post is (49) sufficient, if the letter were properly addressed. (50)

Proof of sending one of two duplicate notices by the post may be established by the duplicate notice, without giving notice to produce that which was sent. (51)

(45) Comb. 450.

(46) 12 Mod. 346., Malynes, B. 3. c. 5. s. 6. p. 264., 10 Mod. 110.

(47) Vide Beawes, s. 231. p. 445. Molloy, B. 2. c. 10. s. 27.

(48) Brown v. Messiter, antè, p. 372. n. (83).

(49) Saunderson v. Judge, antè, p. 210. n. (13). p. 278. n. (116).

(50) As to what is to be deemed a proper address vide antè, p. 280.

(51) Roberts v. Bradshaw, 1 Stark. 28. In an action by indorsee of a bill against drawer, plaintiff's clerk proved that, on the day the bill was dishonoured, his master gave him two papers to compare, purporting to be notices of the dishonour of

Proof of sending notice by letter may be established, without giving notice to produce that letter. (51)

Proof that duplicate notices were written in order that one might be sent, and that a letter was sent to defendant at that time, will be sufficient evidence that such letter contained the notice, if defendant, on notice, do not produce such letter. (51)

But, it has been held, that proof that a notice was put into the post, either the day it ought to have been sent, *or the day following*, is not (though notice to produce be given) sufficient evidence that the notice was sent in time (52) :

And that it cannot be submitted to the jury for their consideration. (52)

the bill, one of which he produced ; it was objected that the one produced could not be read unless notice had been given to produce the other. Lord Ellenborough thought otherwise, and said, a letter acquainting a party with the dishonour of a bill was in nature of a notice, and it was unnecessary to prove notice to produce such a letter ; plaintiff could not then prove specifically that any notice was sent, but he proved that the same day he sent a letter to defendant, the contents of which his witness did not know, and that he had given due notice to produce that letter. Lord Ellenborough thought this sufficient evidence that the letter amounted to notice, for if it did not, defendant might produce it : and plaintiff had a verdict. Defendant moved for a new trial, but the Court of King's Bench refused a rule.

(52) *Lawson v. Sherwood*, 1 Stark. 314. In an action against an indorser, it was necessary for plaintiff to prove that notice was sent to the defendant the second day after the bill became due :

Production of the instrument is (53) sufficient evidence of a protest.

On a judgment by default in an action upon a bill or note, no (54) evidence need be given.

a witness proved that he sent him a notice two or three days after the bill became due, but whether it was the second or third day he could not state; notice to produce was proved, and it was urged for plaintiff, that as defendant did not produce what had been sent, this was evidence to go to the jury that the notice was sent on the second day: but Lord Ellenborough thought otherwise; he said, "the non-production only entitled plaintiff to give parol evidence of its contents; plaintiff was bound to give notice on the second day, and evidence that he gave it either on that or the following day could not be left to the jury as evidence that he gave it on the second." Plaintiff was therefore nonsuited.

(53) *Anon.* 12 Mod. 345. To prove a protest, the plaintiff produced an instrument attested by a notary public; and though it was insisted that he should prove this instrument, or, at least, give some account how he came by it, Holt C. J. ruled that it was not necessary.

(54) *Bevis v. Lindsell*, Str. 1149. On executing a writ of enquiry in an action on a note, the plaintiff did not produce the subscribing witness, but offered other evidence that it was the defendant's hand, and the Court held *that* sufficient; "for, the note, being set out in the declaration, is admitted, and the only use of producing it is, to see whether any payment is indorsed upon it."

Mills v. Lyne, B. R. Hil. 26 G. 3. On a writ of enquiry in an action upon a note, the sheriff directed the jury to give nominal damages only, because the plaintiff could not prove the note. Lawrence insisted that the plaintiff was bound to produce the note (because, a receipt of part might have been indorsed thereon), and to prove the defendant's signature; but the Court set aside the inquisition.

Green v. Herne, 3 Term Rep. 301. Upon a rule nisi to set aside an inquisition against the acceptor of a bill of exchange,

The Court (55) will, therefore, upon such judgment, even in *assumpsit*, if the bill or note be for the payment of British money, refer it to an officer to ascertain the sum due for principal, interest, and costs, and give the plaintiff final judgment without a writ of enquiry.

And if the bill or note be lost pending the action, they will refer it on a verified copy. (56)

But the (57) Court will not refer it, if the bill or note be for the payment of foreign money.

it was urged that the bill, though *produced* before the jury, was not *proved*; but the Court held that, by suffering the judgment, the defendant admitted the acceptance of the bill, and that he was liable to its amount; and Buller J. said, "the only reason of producing the bill is, to see whether any part of it is paid."

(55) *Shepherd v. Charter*, 4 Term Rep. 275. The defendant having suffered judgment by default in an action on a bill, the plaintiff obtained a rule to show cause why it should not be referred to the master, to compute what was due for principal and interest. The rule was opposed upon the general ground that a reference in such cases was improper; but the Court thought otherwise; and Grose J. observed that the Judges in the Common Pleas gave the case before them great consideration before they referred the question to one of the prothonotaries; and the rule was made absolute. The same had previously been done in *Rashleigh v. Salmon*, 1 H. Bl. 252., *Andrews v. Blake*, 1 H. Bl. 529., *Longman v. Fenn*, 1 H. Bl. 541.; and it is now every day's practice in the King's Bench and Common Pleas, but not in the Exchequer. Vide *Chilton v. Harborn*, 1 Anstr. 249.

(56) *Brown v. Messiter*, ante, p. 372. n. (83).

(57) *Maunsell v. Lord Massareene*, 5 Term Rep. 87. The Court discharged a rule nisi for referring it to the master to compute principal, interest, and costs, upon a bill of exchange; because, the bill was for the payment of 200*l.* Irish money. See also *Napier v. Schneider*, post, p. 489. n. (59).

Nor will they refer it, to ascertain the amount of (58) charges and expenses; nor direct the allowance of (59) re-exchange upon a foreign bill.

And though the action be, in fact, brought to recover the money due upon a bill or note, yet the Court will not refer it to the officer (60), unless the bill or note be stated in the declaration.

(58) *Goldsmid v. Taite*, 2 Bos. and Pull. 55. On a rule to show cause why a bill of exchange should not be referred to the prothonotary to compute principal, interest, exchange, re-exchange, charges, expenses, and costs, it was objected that charges and expenses were not matter of mere computation: and the counsel for the rule consenting to strike out those words, the Court made the rule absolute. But as to re-exchange, see the next note.

(59) *Napier v. Schneider*, 12 East's Rep. 420. A bill was drawn in Scotland upon and accepted by the defendant in England, and on motion to refer it to the master to compute principal, interest, and costs on this bill, the Court was prayed to direct the master to allow re-exchange; but this they refused, saying that they would not refer it to the master to try foreign customs and facts, but only to compute what was due upon the bill itself. They therefore granted the rule in the common form.

(60) *Osborne v. Noad*, 8 Term Rep. 648. The declaration contained only counts for goods sold, and work and labour, and the common money counts. On judgment by default, the plaintiff obtained a rule nisi to refer it to the master to compute principal and interest on two notes; and in support of the rule, an affidavit was produced, stating that the action was brought to recover the amount of these notes, and that such amount was recoverable under the money counts. The Court, however, said that the rule was confined to cases in which it appeared by the declaration that the action was brought on the notes or bills. Rule discharged.

Nor will the Court make such reference, in an action of debt brought on a (61) judgment recovered on a bill or note.

Where one count in the declaration is on a bill or note, and the defendant demurs to that count, and judgment is given for the plaintiff, the Court (62) will refer it to the officer to ascertain what is due for principal, interest, and costs, on that count, though there be other counts on which the parties are at issue.

(61) *Nelson v. Sheridan*, 8 Term Rep. 395.

(62) *Duperoy v. Johnson*, 7 Term Rep. 473. The declaration contained many counts, one of which was on a bill; to that there was a demurrer, on which the plaintiff had judgment; to the others there was a plea, on which issue was joined: a rule nisi was obtained to refer it to the master to compute principal, interest, and costs on the bill; and on showing cause against this rule, it was urged that the plaintiff ought either to have waited for the result of the trial of the issue on the other counts, or to have entered a *nolle prosequi* as to those counts. In support of the rule, *Fleming v. Langton*, 1 Str. 532. was cited; and the Court thought that case decisive of the present, and made the rule absolute.

See *Tidd's Practice*, 5th ed. 569., stating that a *nolle prosequi* must be entered on the other counts; but that such entry need not be made *before* the reference to the master; that it is sufficient if done at any time before final judgment.

CAP. XII.

Defence to an Action on a Bill or Note.

Bargain for Renewal or Indulgence at the Time a Bill or Note is given or indorsed, p. 491.

Similar Bargain afterwards, p. 493.

Transfer for a special Purpose only, p. 493.

Want or Insufficiency of Consideration, p. 494 to 503.

_____ *by whom to be insisted on, p. 495.*

Peculiarity of Consideration, such that Plaintiff cannot recover unless he stood in a particular Situation, p. 503.

Illegality of Consideration, p. 504 to 514.

_____ *in Bills or Notes for which others are substituted, p. 514 to 517.*

Illegality of Consideration, by whom to be insisted on, p. 517 to 524.

Want of caution in taking the Bill or Note, where it has been lost or stolen, or improperly obtained, p. 524.

Indulgence, p. 531.

What Defence, to be pleaded specially, p. 531.

ONE species of defence, sometimes attempted upon a bill or note, is, that there was some bargain, when the bill or note was given or transferred, for a renewal or indulgence, or for exempting particular parties from being sued.

But, it is a settled rule that no such defence can be supported by oral evidence, where it is inconsistent with the tenor of the bill or note. (1)

(1) Woodbridge v. Spooner, 3 B. & Ald. 233. Action against executors, on note payable on demand for value received:

Thus, upon a bill or note payable at a specified time, parol evidence of a bargain when it was issued, that it was not to be paid till I. S. should die, or certain estates should be sold, is inadmissible. (1)

evidence was received, that, at the time the note was given, it was agreed it should not be payable till after the maker's death, and should then be in nature of a legacy; and on that ground, nonsuit: but, on rule nisi to enter verdict for plaintiff, and cause shown, the whole Court held the evidence should not have been received; because, it imported a different bargain and agreement from what the note expressed; and rule absolute.

Free v. Hawkins, 8 Taunt. 92. In an action upon a note by indorsee against indorser, defendant insisted upon want of notice of the dishonour; plaintiff offered parol evidence that at the time the note was given, and defendant (who only lent his name) indorsed it, it was understood that payment was not to be required until certain estates of the maker were sold, and then only in case they did not produce sufficient, and that therefore the defendant knew the note had not been honoured. Gibbs C. J. rejected the evidence, and nonsuited the plaintiff; and on a rule nisi for a new trial, the Court held the evidence rightly rejected, because it contradicted the note, and the rule was discharged.

Rawson v. Walker, 1 Stark. 361. In an action by the payee against the maker, on a note payable on demand, defendant offered parol evidence, that it was given for goods sold to a bankrupt by his assignees, and that defendant was not to be called upon, unless his allowance under the commission should not be sufficient to pay the amount: per Lord Ellenborough, "I am ready to admit evidence to show the consideration illegal; but, I cannot receive parol evidence inconsistent with the terms of the note; upon a note payable on demand, parol evidence to show it was not to be payable upon demand, but on a contingency only, is not admissible." Verdict for plaintiff.

Same point, *Campbell v. Hodgson*, Gow, 74.

So, upon a general indorsement of a bill or note, the like evidence of a bargain at the time of the indorsement, that the bill should be renewed, cannot be received. (2)

But, parol evidence of a bargain after a bill or note was given or transferred, will be admissible; and the bargain, if there be a sufficient consideration to support it, will be binding. (2)

Where the ground of defence is an engagement to renew, it will be incumbent on the defendant to show that he has taken the proper steps towards such renewal. (3)

It is a defence to an action on a bill, that it was passed to plaintiff by the first indorser for the

(2) *Hoare v. Graham*, 3 Campb. 57. Indorsee against payee of a note payable two months after date. Defence, that defendant refused to indorse unless plaintiffs would agree that the note should be renewed when due, and that plaintiff acceded to that condition: *sed per Lord Ellenborough*, "I cannot admit this evidence; it is inconsistent with the written instrument: I will receive evidence that the note was indorsed to plaintiffs as a trust; there may, after a bill is drawn, be a binding promise for a valuable consideration to renew it; but, if the promise be contemporaneous with the drawing, the law will not enforce it; it would be incorporating with a written contract an incongruous parol agreement." Verdict for plaintiff.

(3) *Gibbon v. Scott*, 2 Stark. 286. In an action by drawer against acceptor on a bill for the freight of a chartered ship, the defence was, that plaintiff had engaged to renew the bill if the charterer did not return before the bill was due; but no application appearing to have been made to plaintiff to renew, Lord Ellenborough thought the defence failed, and the plaintiff had a verdict.

special purpose of his getting it discounted for the first indorser, and that instead of so doing he claimed to hold it for a debt owing to him by the second indorser. (4)

Another species of defence to an action in respect of a bill or note, is, (5) want or inadequacy of consideration for giving or transferring it.

(4) *Delaunay v. Mitchell*, 1 Stark. 439. E. Clwer held a bill payable to herself or order, and indorsed first by herself, and secondly by her son: to prevent a commission against her son, she delivered the bill to plaintiff, that he might get it discounted for her; he did not get it discounted, but insisted on holding it for a debt the son owed him, and sued the acceptor; but Lord Ellenborough thought it clear he could not maintain the action, and directed a nonsuit.

(5) *Jefferies v. Austen*, Str. 647. In an action by the payee of a note against the maker, Eyre C. J. of the Common Pleas, allowed the defendant to prove, that it was given as a reward in case the plaintiff procured the defendant to be restored to an office, and that the defendant was not restored; and on this proof the defendant had a verdict.

Jackson v. Warwick, 7 Term Rep. 121. The defendant's son was apprenticed by indenture to the plaintiff; and the defendant gave the plaintiff a note for 10*l.* as an apprentice fee; but this premium was not mentioned in the indentures, nor were they stamped pursuant to 8 Ann. c. 9. The son remained part of his time, and then absconded. In an action on the note, and the failure of consideration (the apprenticeship) relied on as a defence, it was contended that the avoiding the indentures could not collaterally affect the note, and that at all events the consideration had not wholly failed, inasmuch as the plaintiff had maintained the apprentice during his stay. Lawrence J., however, thought that the consideration was entire, and had wholly failed; but he allowed a verdict to be taken for the plaintiff, with liberty to the defendant to move to enter a nonsuit. The Court concurred in opinion with Lawrence J., and directed a nonsuit to be entered.

A total failure of consideration is, where it can be insisted upon, a total bar: inadequacy, or a partial failure, a bar pro-tanto only. (6)

Thus, in an action against an acceptor, it is a good defence, either wholly or in part, that the acceptance was either wholly or in part for the accommodation of the plaintiff (7);

(6) *Barber v. Backhouse*, Peake, 61. In an action on a bill of exchange by the payee, the defendant paid part of the money into Court, and it appeared upon the trial that there was no consideration for the other part. Law, however, urged that the payment of the money into Court admitted the bill was good for part, and if it were good for part, it was good in toto; but Lord Kenyon declared himself clearly of a contrary opinion, upon which the jury found for the defendant; and this case being afterwards mentioned by Lord Kenyon in the course of argument, Law said he was perfectly satisfied with the decision.

Ledger v. Ewer, Peake, 216. In an action by the payee of a bill against the acceptor, the consideration appeared to be that the plaintiff had taken the defendant into partnership; but on the defendant's friends' advice he broke off the connexion. There was evidence of fraud on the plaintiff's part in drawing the defendant into the engagement, which Lord Kenyon left to the jury; but he told them if they were against the defendant on the evidence of fraud, they should take into consideration the damages the plaintiff had really sustained by the non-performance of the contract, and were not obliged to find the whole amount of the bill; the jury, however, found for the defendant.

(7) *Darnell v. Williams*, 2 Stark. 166. Payee against acceptor on bill for 19*l.* 12*s.* Defendant proved that he had value for 10*l.* only, and that he accepted for the rest to accommodate the plaintiff; and per Lord Ellenborough, "Though this, as to third persons, is a bill for 19*l.* 12*s.*, yet as between these parties, the acceptance is for 10*l.* only;" and that sum having been paid before the action, he nonsuited the plaintiff.

Or of some person for whom the plaintiff is trustee. (8)

Where an action is brought by several plaintiffs against an acceptor, it is a sufficient defence, that the acceptance was given to accommodate one of them, and that he was to have provided money to pay it. (9)

So, where a bill or note is given, either wholly or as to a specific part, as the consideration of a special contract, and that contract either fails in toto or is in toto rescinded, it will be an answer to an action on the bill or note, either wholly or pro tanto, if the plaintiff stand in a situation which makes him liable to such a defence. (10)

(8) *Jones v. Hibbert*, 2 Stark, 304. Defendant accepted a bill for 415*l.* to accommodate Philips and Co.: Philips and Co. indorsed it to their bankers for value, and became bankrupts: the bankers knew it to be an accommodation acceptance, and their demand against Philips and Co. was 265*l.* only: in an action by them upon this acceptance, it was held that they could only recover the 265*l.*; and they had a verdict accordingly.

(9) *Sparrow and others v. Chisman*, 9 Barn. & Cr. 241. Action by plaintiffs as indorsees of two bills for 1500*l.* each, drawn by Peckover, one of the plaintiffs, against defendant as acceptor. It appeared that defendant lent his acceptances to accommodate Peckover, and that Peckover engaged to pay them. A verdict being found for plaintiffs, rule nisi for new trial, on the ground that as Peckover was to have provided for the bills, he was precluded from joining in an attempt to enforce payment from defendant; the three Judges were of that opinion, and the rule was made absolute.

(10) *Lewis v. Cosgrave*, 2 Taunt. 2. This was an action on a banker's check drawn by the defendant, and given to the

But, the partial failure of consideration will constitute no defence, if the quantum to be deducted on that account be matter, not of definite computation, but of unliquidated damages.

Thus, if a bill or note be given for the stipulated price of goods previously delivered, it is no ground of partial defence that the price was exorbitant (11);

Or that the goods were damaged when they ought to have been sound (12);

plaintiff for the price of a horse sold by the plaintiff to the defendant, and warranted sound. The horse was, in fact, unsound, and that was relied on as a defence. The defendant proved that he had sent back the horse, but the plaintiff refused to take it; he, however, sent it again, and left it in the plaintiff's stable without his knowledge. Heath J. told the jury that as the plaintiff had refused to receive back the horse, the contract for the sale was not rescinded, and that the defendant was, therefore, bound to pay the check, and had his remedy by action for the deceit. They found a verdict for the plaintiff; but, on a rule nisi for a new trial, and cause shown, the Court, on the ground of there being clear evidence of fraud, made the rule absolute. See *Weston v. Downes*, Dougl. 23., *Power v. Wells*, Cowp. 818., and *Towers v. Barrett*, 1 Term Rep. 133.

(11) *Solomon v. Turner*, 1 Stark. 51. In an action by payee of a note against the maker, the defence was that that and another note, which had been paid, had been given as the price of certain pictures, and that the pictures were not worth the amount of the other note: and per Lord Ellenborough, "I will not admit evidence for the purpose of reducing the damages, that the pictures were of inferior value; if by inadequacy of value, and other circumstances, you can prove fraud, so as to show there was no contract at all, the evidence will be admissible; if it fall short of that, it will be unavailable;" it did fall short, and plaintiff had a verdict.

(12) *Morgan v. Richardson*, 1 Campb. N. P. C. 40. n. To an action by the drawer against the acceptor of a bill, drawn

Unless the contract were rescinded on that ground. (13)

So, it is no answer to an action on a bill or note, that it was given as the condition of a lease to be executed by the plaintiff and of letting the defendant into possession of the premises, and that plaintiff had refused to execute the lease: for, he is not bound to execute till the price is paid; and as the defendant was let into possession, the consideration fails in part only; and the sum to be allowed for such failure is matter, not of mere calculation, but of unliquidated damages. (14)

payable to the drawer's order, the defence was that the bill had been accepted for the price of some hams, and that they had proved to be so bad as to be almost unmarketable. The sum for which they were actually sold was paid into Court. Lord Ellenborough held, that this partial failure of consideration was no defence to this action, but that the defendant must take his remedy by action. *S. P. Fleming v. Simpson*, 1 Campb. N. P. C. 40. n. From 2 Campb. N. P. C. 346., it appears that the case of *Morgan v. Richardson* was afterwards brought before the Court of King's Bench, and that the Court approved of the direction of the Chief Justice.

In *Tye v. Gwynne*, 2 Campb. N. P. C. 346., the same point again arose in an action by the drawer of a bill against the acceptor, and Lord Ellenborough said that he should certainly adhere to the judgment the Court gave in *Morgan v. Richardson*.

Vide *Broom v. Davis*, cit. 7 East's Rep. 480. See also *Basten v. Butter*, 7 East's Rep. 479., and the cases therein cited.

(13) *Lewis v. Cosgrave*, antè, p. 496. n. (10).

(14) *Moggridge v. Jones*, 14 East, 486. In an action on a bill for 200*l.* by drawer against acceptor, the defence was that the acceptance was given as part of the consideration for a lease plaintiff was to execute to defendant, and which he had

So, it is no answer to an action on a bill or note, that it was for an apprentice fee, and that the apprenticeship had been dissolved for misconduct in the master (15) ;

Unless it appear that the fee was not to be paid unless the apprenticeship continued till a given period, and the dissolution occurred before that period had arrived. (15)

The want of consideration, in toto or in part,

refused to execute : by the agreement plaintiff agreed to let, and defendant to take, for twenty-one years, from 29th December next ; and plaintiff, in consideration of 500*l.* to be paid by defendant by three bills, agreed to execute the lease : defendant was let into possession and gave the bills, of which that sued on was one. Lord Ellenborough held the refusal to execute the lease no answer to the action ; and that the consideration had not wholly failed, because plaintiff had been let into possession : verdict for plaintiff. Motion for new trial : but the Court thought the verdict right, and that defendant must resort to his remedy upon the agreement, if plaintiff persisted in refusing to execute the lease.

(15) *Grant v. Welchman*, 16 East, 207. Payee against maker, on note for 6*l.* of three years' standing : defence, first, that it was in part for an apprentice fee, and that the apprenticeship was for less than seven years ; secondly, that a year before the action the apprentice was discharged, because plaintiff had enticed him to commit felony : Graham B. overruled both objections : and on motion for nonsuit, the Court answered to the first objection, that the apprenticeship was voidable only, not void ; and on the second, they enquired how the consideration for the apprentice was reserved, and it appearing that it was all to be paid at the time of the binding, but that the note was taken as an indulgence, they thought that decisive against defendant ; and rule refused.

See *Jackson v. Warwick*, *antè*, p. 494., and *Ledger v. Ewer*, *antè*, p. 495.

cannot be insisted upon, if the plaintiff, or any intermediate party between him and the defendant, took the bill or note *bonâ fide*, and upon a valid consideration. (16)

Where it has been so taken, it is no defence that the bill or note was originally accommodation paper, and known so to be. (17)

And to support the defence against a person who may be a *bonâ fide* holder for value, the plaintiff should be apprised before the trial that he will be required to show from whom he took the

(16) *Morris v. Lec*, B. R. Hil. 26 G. 3. In an action by the indorsee against the maker of a note thirteen years old, the defendant obtained a rule nisi to set aside a judgment by default, on an affidavit by a third person that he believed the defendant was swindled out of the note. An affidavit was made on the other side that the plaintiff took the note *bonâ fide*, and gave a valuable consideration for it; and the Court held, that however improperly it might have been obtained, a third person, who took it fairly and gave a consideration for it, was entitled to recover, and they discharged the rule. And see *Com. 43. 1 Term Rep. 40. 2 Term Rep. 71. 2 Atk. 182. Bull. Nisi Prius, 274.* See also *De Bras v. Forbes*, 1 Esp. N. P. C. 117.

(17) *Smith v. Knox*, 9 Esp. N. P. C. 46. In an action by the indorsee of the drawer of a bill against the acceptor, it was urged in defence that this was an accommodation acceptance. But Lord Eldon said, "if a person give a bill for a particular purpose, and that is known to the party taking the bill, as, for example, to answer a particular demand, then the party taking the bill cannot apply it to a different purpose; but where a bill is given under no such restriction, but given merely for the accommodation of the drawer or payee, and that is sent into the world, it is no answer to an action brought on that bill, that the defendant accepted it for the accommodation of the drawer, and that that fact was known to the holder."

bill or note, and on what consideration; otherwise, that defence may be excluded. (18)

If a banker be under acceptance for a customer to an amount beyond the cash balance in his hands, every bill he holds of that customer's *bonâ fide* he is to be considered as holding for value. (19)

And it makes no difference, though he hold other collateral securities more than sufficient to cover the excess of his acceptances. (19)

And it is no ground for impeaching his right to a bill payable to such customer or creditor on

Charles v. Marsden, 1 Taunt. 224. Indorsees of the drawer of a bill against the acceptor. The defendant pleaded that he had accepted the bill for the accommodation of the drawer, without any consideration, and that after the bill became due it was indorsed to the plaintiffs, they knowing that it was an accommodation one. On special demurrer to the replication, the argument turned on the validity of the plea; and the whole Court held, that there being no fraud or collusion alleged, the plea was bad, and gave judgment for the plaintiffs. *Sed quære*.

(18) See *Paterson v. Hardacre*, *antè*, p. 472.

(19) *Bosanquet v. Dudman*, 1 Stark. 1. Plaintiffs sued as indorsees of a bill, and it was made a question whether they were holders for value: they had it from Clarkson and Co., for whom they were bankers, and they took this and many other securities to cover their advances and acceptances: they were under acceptances for Clarkson and Co. beyond the amount of the cash balance in their hands; and a question being put as to the amount of the acceptances and cash balance, and the value of the other securities, Lord Ellenborough said he should hold that, if the acceptances exceeded the cash balance, plaintiffs held all the collateral securities for value. The enquiry was dropped, and plaintiffs had a verdict. See *ex parte*, *Bloxham*, *antè*, p. 434.

demand, that such bill was one or two years old when he took it. (20)

Affection is not a sufficient consideration for a bill or note (21);

(20) *Heywood and others v. Watson*, 4 Bingh. 496. In 1824 Morrall and Watson banked with plaintiffs. They got leave from plaintiffs to overdraw, and on that account Morrall gave plaintiffs his promissory note, payable to plaintiffs on demand, for 2000*l.*, dated 9th February 1824. On 10th February, Watson gave Morrall a note for 1000*l.*, payable to Morrall or order on demand. It was given to secure to Morrall a moiety of what he should be compelled to pay, either on his note for 2000*l.* or on the joint account of himself and Watson. Morrall and Watson continued in partnership till February 1825, and the balance from them to plaintiffs at that time was 1300*l.* Morrall indorsed to plaintiffs Watson's note for 1000*l.*, but the time at which it was indorsed did not appear. Plaintiffs had it in June 1826, but whether they had it before that time did not appear. There was nothing to show that plaintiffs knew under what circumstances Morrall had the note from Watson, or that they were apprised of the occasion upon which it was given. Plaintiffs sued Watson upon the note, and a special case having been reserved, it was insisted that the indorsement by Morrall to plaintiffs was evidently a trick by Morrall to compel Watson to pay 1000*l.*, the whole amount of the note, instead of 600*l.*, his moiety of the debt due from Morrall and Watson to plaintiffs; but the Court held, that as there was nothing to show that plaintiffs knew upon what occasion or for what cause Watson gave the note to Morrall, plaintiffs were entitled to the full amount of the note from Watson; and if Watson were thereby forced to pay more than as between Morrall and him he ought to pay, that was to be settled between him and Morrall.

(21) *Holliday v. Atkinson*, 5 Barn. & Cr. 501. In an action on a note, importing to be for value received, by payee against the executor of the maker, it appeared that plaintiff was only nine years old when the note was given, and there was no evidence of consideration: the jury were told that proof of con-

Nor is gratitude. (21)

Nor an intention to avoid the legacy duty. (21)

If the consideration upon which a bill or note is given or transferred be one, which the plaintiff, upon principles of public policy, would be precluded from recovering unless he could prove that he stood in a particular condition, he must be prepared, at his peril, to prove that he stood in that condition (22);

At least, if he have had notice that the consideration will be disputed (22);

sideration was not necessary, that many good considerations might have existed, and that affection towards the child, gratitude towards the father, or an intention to avoid the legacy duty, would have sufficed. On rule nisi for new trial, and cause shown, the Court thought that considering the child's age at the time, and that it appeared that the testator was in a state of imbecility, it was a question for the jury, whether the note was given on a legal consideration; that neither gratitude to the father, or affection to plaintiff, nor, as they thought, an intention to avoid the legacy duty, would have constituted a legal consideration.

(22) *Blogg v. Pinkers*, 1 Ryan & Moody, 125. Plaintiff sued upon a note for 180*l.* in consideration of his care and medical attendance bestowed on the maker: defendant gave notice of his intention to dispute the consideration on which the note was given: his defence was, that it was given for plaintiff's services and medicines as an apothecary, and he insisted thereupon that plaintiff was bound to show he had obtained his certificate under 55 G. 3. c. 194. § 21. Best C. J. said he should leave it to the jury whether the services, &c. for which the note was given were not those of an apothecary, and intimated his opinion that if they were, plaintiff could not recover without bringing himself

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As, in the case of a man who sues upon a bill or note given him for his bill (22) as an apothecary.

Illegality in the consideration, either wholly or in part, is another ground of defence.

The (23) debt of a third person, or a debt barred either by (24) the statute of limitations, by a discharge under an insolvent or fugitive act, by a (25) bankruptcy and certificate, or by a composition, is a good consideration; and so is an apprentice fee, though the apprenticeship be for less than seven years. (26)

But, the consideration of (27) signing a bankrupt's certificate, of withdrawing a petition (28)

within the provisions of that statute. Upon that intimation plaintiff's counsel elected to be nonsuited.

(23) *Popplewell v. Wilson*, Str. 264. A. gave a note to pay so much to B. for a debt due from C. to B.; and on error, it was objected that the debt of a third person was no consideration; but the Court thought otherwise, and the judgment was affirmed.

(24) Vide Lord Raym. 389. 6 Mod. 309. Burr. 2630. Blackst. 703. Cowp. 290.

(25) *Trueman v. Fenton*, Cowp. 544. *Birch v. Sharland*, 1 Term Rep. 715. Cowp. 290.

(26) See *Grant v. Welchman*, antè p. 499.

(27) *Summer v. Brady*, 1 H. Bl. 647.

(28) By 6 G. 4. c. 16. § 125., any contract or security made or given by any bankrupt, or other person, unto or in trust for any creditor, or for securing the payment of any money due by such bankrupt at his bankruptcy, as a consideration, or with intent to persuade such creditor to consent to or sign such certificate, shall be void, and the money thereby secured or agreed to be paid shall not be recoverable. And see *Smith v. Bromley*, Dougl. 670.

- against it, or of (29) joining in the acceptance of a composition, is illegal.

It is a good defence to an action on a bill or note, that it was given as a composition with creditors, and that before plaintiff would accede to the composition, he insisted upon receiving, and did receive, without the knowledge of the other creditors, to the amount of the composition. (30)

And it will make no difference that plaintiff had the goods or money from a third person (30);

Or that plaintiff was the last person who acceded to the composition. (30)

(29) *Spurrett v. Spiller*, 1 Atk. 105. *Cockshott v. Bennett*, 2 Term Rep. 763. *Jackson v. Lomas*, 4 Term Rep. 166. *Cooling v. Noyes*, 6 Term Rep. 263.

(30) *Knight v. Hunt*, 5 Bingh. 432. Wm. Watson owed plaintiff 300*l.* and proposed to compound with his creditors for 10*s.* in the pound: plaintiff refused to accede to the propositions, upon which, Watson's brother agreed to supply plaintiff with coals to the amount of 150*l.* at his own cost, if plaintiff would sign the composition; plaintiff consented, and signed an agreement "to take 10*s.* in the pound, to be paid with the other "creditors." Plaintiff was the last creditor who signed; but the arrangement about the coals was not known to the other creditors. The coals were supplied, and a note for the composition given, and an action being brought upon the note, Littledale J. thought the bargain as to the coals a fraud upon the other creditors, and that, as plaintiff got by the coals as much as the other creditors got by the composition, he was not entitled to recover upon the note, and under his direction the jury found for the defendant. On motion for a new trial, the Court of Common Pleas thought his direction right, and as plaintiff had his 10*s.* in the pound in coals, they thought he ought not to have it again in money. It was not a gratuitous gift after

So it is an answer to an action on a bill or note, that plaintiff had a demand upon other bills or notes from the defendant, and took a composition upon them from the defendant; if plaintiff held and had a demand upon all the bills or notes at the time he agreed to take the composition, or that fact were unknown to the other creditors; for, if he take a composition, he must take it upon the whole of his demand; or apprise the other creditors if he do not: he is not to take a composition upon part, and continue a creditor for the whole of the residue of the debt. (31)

If the creditor of a bankrupt be also an acting commissioner under his commission, and take a bill or note for his debt whilst the commission is in progress, he cannot enforce payment of such bill or note. (32)

the composition was paid, but a stipulation before the composition was agreed upon. Rule refused.

(31) *Britten v. Hughes*, 5 Bingham 460. Plaintiffs held two bills drawn by defendant, the one for 400*l.* due 4th May 1826, and the other for 156*l.* On 10th May he signed a composition deed between defendant and his creditors, which contained a release for the bill of 156*l.*, but he did not notice the bill for 400*l.*, nor were the creditors apprised of it; he afterwards sued defendant upon the bill for 400*l.*, and defendant relied on the composition deed as a defence. Best C. J. thought it was a fraud upon the other creditors to sign only upon one bill, when he had a demand upon two, without apprising the other creditors that that was the case, and he nonsuited the plaintiff. On a rule to show cause why the nonsuit should not be set aside, the Court (Gaselee J. differing) held the nonsuit right, and dismissed the rule.

(32) *Haywood v. Chambers*, 5 Barn. & Ald. 753. 1 Dow. &

Especially, if he afterwards signed the bankrupt's certificate as such commissioner. (32)

Though he did not prove his debt under the commission. (32)

Where however a creditor *has* joined in a deed of composition, it is (33) not illegal to obtain the security of a third person for such composition.

And therefore a bill given by a third person, as such security, is good (33);

Though such creditor's composition be thereby secured to be paid at an (33) earlier period than that of the other creditors.

But, to stipulate privately for such additional security before joining in the acceptance of the composition, is a (34) fraud on the other creditors.

Ry. 411. In an action by payee of a note against the maker, it appeared that defendant had been a bankrupt and obtained his certificate; that the note was given to plaintiff, between the second and third meetings, for a debt due before the bankruptcy; that plaintiff was one of the acting commissioners under the defendant's commission; that he did not prove his debt under the commission, but that after he had received the note he signed the defendant's certificate as one of the commissioners. Abbott C. J. thought defendant not a free agent when he gave the note, and nonsuited the plaintiff; and on motion to enter a verdict for plaintiff, the Court said, "a security to induce a commissioner to sign a bankrupt's certificate would be clearly void, and it was against public policy to allow any thing which led to that result: a commissioner has an important public duty to perform, and this would have a tendency to warp his conduct in the discharge of it; and in giving a security under such circumstances, the bankrupt could not be deemed a free agent." Rule refused.

— (33) *Feise v. Randall*, 6 Term Rcp. 146.

(34) *Leicester v. Rose*, 4 East's Rep. 372.

And if there be a private stipulation for more than the composition-money from a third person, and the third person pay the money, he cannot recover upon any bill or note the debtor may give him for reimbursement (35) ;

Though the credior were induced originally to trust the debtor upon a representation by such third person of his (the third person's) responsibility(35) ;

And refused, on the ground of that representation, to consent to the composition without such stipulation. (35)

Past (36) seduction is a good consideration ; future (37) prostitution, an illegal one.

A note given to parish officers for a sum certain, to defray the future expenses of a bastard child, is (38) illegal ; the officers being authorised by law to take an indemnity only.

(35) *Bryant v. Christie*, 1 Stark. 329. Bach trusted Christie to the amount of 332*l.*, on a representation by Bryant of Christie's responsibility. Christie became embarrassed, and offered to compound with his creditors at 10*s.* in the pound. Bach considered himself guaranteed by Bryant, and therefore refused to sign the composition deed unless Bryant would promise him the remainder of his debt. Bryant promised accordingly, and Bach signed the deed which released Christie: the composition was paid, and Bryant paid the difference. Christie accepted bills to reimburse Bryant, and Bryant sued thereon. But Lord Ellenborough considered this as a circuitous mode of securing Bach the full amount of his debt, and a fraud upon the creditors at large, and he nonsuited the plaintiff.

(36) *Annandall v. Harris*, 2 P. Wms. 432. *Cray v. Rooke*, Forrester, 153. *Turner v. Vaughan*, 2 Wils. 339.

(37) *Walker v. Parkins*, Burr. 1568.

(38) *Cole v. Gower*, 6 East's Rep. 110.

Dropping (39) a criminal prosecution, or suppressing evidence thereon, is an illegal consideration: but, where a person has been convicted of a misdemeanor, and the Court offer that if he will pay a certain sum for the expenses of the prosecution, the sentence shall be for a shorter period of imprisonment than it otherwise would be, a note given by him for such sum is (40), as far as respects the consideration, unobjectionable.

And where there are both civil and criminal proceedings, an agreement to compound the civil proceedings and to take a given sum for costs, and that defendant shall give a bill for the amount, will not make the bill illegal, if the criminal costs do not appear to have been included, and it be no part of the bargain that the criminal proceedings shall be abandoned. (41)

(39) 3 P. Wms. 279. *Collins v. Blantern*, 2 Wils. 349.

(40) *Beely v. Wingfield*, 11 East's Rep. 46.

(41) *Harding v. Cooper*, 1 Stark. 467. In an action against the acceptor of a bill, it appeared that plaintiffs had sued the drawer and taken out a commission of bankruptcy against him, and, on his having obtained his discharge as an insolvent, had indicted him for fraud in obtaining it. They then came to an agreement that plaintiffs should have 2*s.* 6*d.* in the pound for their debt, 220*l.* for costs, without taxation, and that the commission should be superseded, and defendant gave his acceptance for the amount. Plaintiffs afterwards consented that the indictment should be quashed. It was urged that this was an illegal consideration; and Lord Ellenborough said, "a stipulation to drop the prosecution would, without doubt, have been illegal; but, if the civil rights only were compounded, and plaintiffs chose afterwards to forego the prosecution, the

So, the release by an excise officer of a person apprehended for penalties under the excise laws, is a (42) sufficient consideration for a note given, with the approbation of the commissioners, for the amount of such penalties.

Or if an officer who has a warrant to levy excise penalties take a note for the amount, though such a transaction ought to be looked upon with extreme jealousy, yet, if there have been no extortion, in the officer, nor other improper conduct, the consideration will be unobjectionable, and the note valid. (43)

Especially, if the commissioners afterwards approve of what has been done. (43)

"transaction was not illegal:" and there being no evidence that the costs of the prosecution were mentioned during the negotiation, or included in the 220*l.*, or that there was any stipulation for dropping the prosecution, the plaintiffs had a verdict.

(42) *Pilkington v. Green*, 2 Bos. & Pull. 151.

(43) *Sugars v. Brinkworth*, 4 Campb. 46. Defendant was convicted in excise penalties to the amount of 340*l.*, and plaintiff, a supervisor, had a warrant to levy the amount. Plaintiff took defendant's note at two months for that sum, and though he had no previous authority from the commissioners to take it, they approved of it when they knew it. In an action upon the note it was urged, that there might be great abuses if the taking a note for penalties were allowed: and Lord Ellenborough said "if there were any reason to think the law had been abused by plaintiff, he would not be allowed to enforce payment; that such a transaction was to be looked to with extreme jealousy; but that here plaintiff appeared to have acted with perfect good faith; and defendant, to whom indulgence had been extended, was not to criminate his benefactor when nothing wrong had been done." Verdict for plaintiff.

A (44) recommendation to an office in the king's household, though of a private nature, and not within the statute of the 5th and 6th Edw. 3. ; a (45) smuggling, an (46) usurious, or a (47) stock-jobbing contract ; a wager upon the future amount of any branch of the (48) public revenue, or selling spirituous liquors in small quantities, contrary to 24 G. 2. c. 40. s. 12., is an illegal consideration. (49)

So, money lost by gaming, (except (50) in some part of a royal palace in which the king is then actually resident, the freehold and inheritance of which part is in the crown, and which is not in lease) ; or betting on the sides of persons so gaming ; money knowingly lent for such gaming or betting ; or money lent at the time and place of such play to any person either then gaming or betting, or who shall, during the play, play or bet ; is (51) an illegal consideration.

And in the case of a bill or note for money lost by gaming, a court of equity will grant an in-

(44) *Harrington v. Du Chattel*, Bro. C. C. 114.

(45) *Guichard v. Roberts*, Blackst. 445. *Banks v. Colwell*, cit. 3 Term Rep. 81.

(46) 12 Ann. St. 2. c. 16. post, p. 518. note (71).

(47) 7 G. 2. c. 8. See *Faikney v. Reynous*, Burr. 2069. *Petrie v. Hannay*, 3 Term Rep. 418. and *Steers v. Lashley*, 6 Term Rep. 61. *Brown v. Turner*, 7 Term Rep. 630.

(48) *Shirley v. Sankey* and others, 2 Bos. & Pull. 130. and *Atherfold v. Beard*, 2 Term Rep. 610.

(49) See *Scott v. Gilmore*, post, p. 514.

(50) 9 Ann. c. 14. § 9.

(51) 9 Ann. c. 14. § 1. post, p. 518.

junction to prevent the winner from parting with it. (52)

A bill or note to repay a broker stock-jobbing differences he has paid, or to enable him to pay them, is bad in the broker's hands (53); "

Or in the hands of any one who takes it with notice (53);

Or after it is due. (53)

But such a bill, though void by the statute to all

(52) *Lloyd v. Gurdon*, 2 Swanst. 180. The prayer of a bill in equity was, that three bills for 8000*l.* given by plaintiff to defendants might be delivered up to be cancelled, the bill charging that they had been given for money won at play; and plaintiff moved for an injunction to restrain defendant from parting with the bills, on the ground that though they were void in their creation, yet, if they were negotiated, the transferees must be made parties to the suit. Lord Eldon granted the injunction till answer or further order.

(53) *Amory v. Merryweather*, 2 Barn. & Cr. 573. Defendant employed White to gamble for him in the funds, and the difference against defendant being 500*l.*, he gave White his note for 499*l.* 10*s.* at three months' date: two years afterwards, White indorsed it for a valuable consideration to plaintiffs, and plaintiffs having threatened to sue defendant, defendant gave them a bond for the amount: plaintiffs did not know what was the consideration when they took the note, they did when they took the bond. In an action on the bond, defendant pleaded these facts, except that he stated that the note was to repay White: verdict for defendant, with leave to plaintiffs to move to enter a verdict. On a rule to show cause, the Court were clear that the facts were an answer to the action; but that the mistake in the plea prevented them from discharging the rule; they, therefore, refused to let plaintiff enter a verdict, but gave defendant leave to amend his plea on his paying the costs of the trial.

intents and purposes, may yet be available in the hands of an innocent indorsee (54), who took it without notice of the illegality, and gave value for it.

Betting on a game at cricket (55), a horse race, or (56) a foot race against time, is gaming within 9 Ann.: insuring (57) in the lottery is not.

So, also, the (58) ransom, or money knowingly (59) lent to enable the owner to obtain the ransom, of the ship or vessel of any British subject, or of any merchandise or goods on board the same, (unless in the case of extreme necessity, to be al-

(54) *Day v. Stuart*, 6 Bing. 109. In an action by the holder against the drawer and indorser of a bill for 311*l.* 17*s.* 6*d.*, the defence was, that the bill had been given by the acceptor to the defendant for the amount of differences in time bargains in the public funds, and was, therefore, void under the stock-jobbing act, and an entry for the amount of the bill in the acceptor's book was read in evidence, and was as follows: "To differences in consols 311*l.* 17*s.* 6*d.*;" and one of the witnesses said, "differences" might mean "differences in point of time." Tindal C. J. left it to the jury, whether the parties meant differences in point of time, or differences between stock bought and stock sold; and they found for the plaintiff. On motion to set aside the verdict, on the ground that the entry was sufficient evidence that the bill was given for time differences, and was, therefore, void, Tindal C. J. said, "supposing that fact to be so, it was not shown that the holder had any notice of it." Rule refused.

Vide *Edwards v. Dick*, post, p. 524.

(55) *Jeffryes v. Walter*, 1 Wils. 220.

(56) *Lynall v. Longbotham*, 2 Wils. 36.

(57) *Lewis v. Piercy*, 1 H. Bl. 29.

(58) 45 Geo.3. c.72. §16, 17. post, p. 519.

(59) See *Webb v. Brooke*, post. p. 519. n. (73).

lowed by the Court of Admiralty,) is an illegal consideration.

If a bill or note be in part upon a consideration which the law has made illegal, and in part upon a good consideration, it has been held that the illegality will taint the whole bill or note; and that the holder, if barred at all by such illegality, will be barred in toto as to his claim on the bill or note. (60)

But, if there be a privity between him and the defendant as to the good part of the consideration, he may recover that part exclusively of the bill or note. (61)

If a new bill or note be substituted for one which was given upon an illegal consideration, it will be open to the same objections as the original bill or note, unless it be reformed so as to exclude what made it illegal. (62)

(60) *Scott v. Gillmore*, 3 Taunt. 226. Action against acceptor: the bill was given to the keeper of a coffee-house by the drawer, partly for money lent, and partly for spirits in small quantities, under 20s. worth at each time; nonsuit on the ground of 24 G. 2. c. 40. § 1½. On motion for new trial, Mansfield C. J. said, "the statute makes the consideration illegal, not merely void, and the security is entire, and cannot be apportioned; and since it is partly given for an illegal consideration, the whole bill is void." See *Spencer v. Smith*, 3 Camp. 9.

Note. The case does not state whether plaintiff was indorsee; if plaintiff were the coffee-house keeper, still, as defendant was a stranger to the original transaction, he could not be liable otherwise than on the bill.

(61) See *Robinson v. Bland*, post. p. 517. note (68).

(62) See *Chapman v. Black*, *infra*. *Wynne v. Callander*, 1 Russ. 293.

If the new bill or note be so reformed as to exclude what made the first illegal, it will be unobjectionable. (63)

Thus, if a bill or note be substituted for one which was given upon an usurious contract, it will be open to the same objections as the original bill or note, if it be not confined to what remains due for principal and legal interest. (64)

And if it were given to an indorsee of the first bill or note who took it *bonâ fide* and for value, he could not before 58 G. 3. c. 93. have sued any of the parties whom the usury would have protected from the first bill or note. (64)

But, a bill or note substituted for one given upon

(63) See *Preston v. Jackson*, p. 516. note (65).

(64) *Chapman v. Black*, 2 B. & A. 588. White got money from Akers upon usurious interest, and indorsed to Akers a bill for 40*l.* upon the transaction: this bill came into plaintiff's hands *bonâ fide* and for valuable consideration, but when it became due it was not paid, and plaintiff was apprised of the usury; it was then arranged that Akers should draw for the amount upon defendant, and that defendant should accept for the accommodation of White, which was done accordingly: nonsuit; and on rule nisi to set aside the nonsuit, and cause shown, the Court thought, that as defendant really stood in the place of White, whatever would be a defence for White was also a defence for defendant; and as plaintiff's recovery in this action would enable Akers to keep the usurious interest he had received, and plaintiff by taking this new security, in which White's name was studiously omitted, was lending himself to screen Akers, the usury was a bar to this action, and the nonsuit right.

an usurious contract will be valid, if it be given for principal and legal interest only (65);

Or for what remains due for principal and legal interest, after reforming all prior payments, and excluding all usurious interest. (65)

A bill or note for the usurious interest cannot be enforced. (65)

If a bill or note be given in part upon a legal, and in part upon an illegal, consideration, and several bills or notes be afterwards substituted in lieu thereof, the effect of the illegality may be confined to some only of the substituted bills or notes, and the others may stand exempt. (66)

(65) *Preston v. Jackson*, 2 Stark. 257. Wyer lent defendant two sums on usurious interest, and took defendant's bonds for the amount: the bonds were afterwards given up, the account settled, and a note given for the usurious interest: Wyer indorsed that note to the plaintiff, and Holroyd J. held, that though a new security for principal and legal interest had been held binding, such a security for the usurious interest was not so, and he would not allow the plaintiff to recover on the note.

(66) *Hubner v. Richardson*, Mich. 1819. Richardson lost to Brown at gaming 90*l.* and owed him other money; and for upwards of 20*l.* of the gaming debt, and upwards of 70*l.* of the other, gave him a 100*l.* note: he paid part, and then gave Brown two notes for 43*l.* each, one of which was indorsed to plaintiff for a valuable consideration, and plaintiff knew nothing of the gaming debt; defendant promised him payment: and in an action on the note, Case, on question whether the gaming consideration vitiated the note in plaintiff's hands; and after argument, the Court held it did not; for, it was for defendant to make out that some of the gaming debt made part of the consideration of this note: it might be wholly included in the other note, which did not appear to have been paid, and defendant's promise to pay this implied an election on his part that it should be included in the other.

As, where a bill or note is given as to half for a gaming debt, and as to the residue for money lent, and two bills or notes of equal amount are afterwards substituted for it, if the giver do any thing which may be considered an election to ascribe the gaming debt to the one, he will be liable upon the other. (66)

Promising to pay one whilst both remain unpaid, shall be deemed an election to ascribe the gaming debt to the other. (66)

But it is no objection to a bill or note that it was drawn in order to be discounted, and that the brokerage for getting it discounted was exorbitant, if the broker did not discount it himself, and the person who did knew nothing of his charge. (67)

The objection of illegality of consideration is in some cases confined to those persons who were parties or privy to such illegality, and those to whom they have passed the bill or note without value; in other cases it is extended even to holders *bonâ fide*, and for value.

The latter cases are, where the consideration is, either (68) wholly or in part (69), signing a bank-

(67) See *Ackland v. Pearce*, 2 Camp. 599. *Young v. Wright*, 1 Campb. 139. *Dagnall v. Wigley*, 11 East, 43.

(68) *Robinson v. Bland*, Burr. 1077. A bill of exchange was partly for money lent at the time and place of play, and partly for money lost at play: and on a case reserved, the Court held that the plaintiff could recover nothing upon the bill, but that he might recover the money lent, on a count for money lent.

(69) Vide 6 Geo. 4. c. 16. § 125. *antè*, p. 504. note (28).

rupt's certificate; money(70) lost by gaming as aforesaid, or by betting on the sides of persons so gaming; money knowingly lent for such gaming or betting; money lent at the time and place of such play to any person either then gaming or betting, or who shall, during the play, play or bet; money lent (71)

(70) By 9 Ann. c. 14. § 1., it is enacted, that all notes, bills, or other securities whatsoever, given, granted, drawn, or entered into, or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities shall be for any money, or other valuable thing whatsoever, won by gaming, or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced for such gaming or betting as aforesaid, or lent or advanced at the time and place of such play, to any person or persons so gaming as aforesaid, or that shall, during such play, so play or bet, shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever.

Bowyer v. Bampton, Str. 1155. Several notes, given by Bampton to Church for money lent to game with, were indorsed by Church to the plaintiff for a full and valuable consideration, and the plaintiff had no knowledge that any part of the consideration from Church to Bampton was money lent for gaming; and after two arguments upon a case reserved, the Court held that the plaintiff could not maintain the action; for, it would be making the notes of use to the lender, if he could pay his debts with them, and it would tend to evade the act, on account of the difficulty of proving notice on an indorsee; and the plaintiff would not be without remedy, for he might sue Church on his indorsement.

(71) *Sed vide*, p. 521. n. (75).

By 12 Ann. st. 2. c. 16., it is enacted, "that no person or persons whatsoever, upon any contract, take directly or indirectly, for loan of any monies, wares, merchandise, or other commodities whatsoever, above the value of 5*l.* for the for-

on an usurious contract; the (72) ransom, or money knowingly (73) lent to enable the owner to ob-

bearance of 100*l.* for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time; and that all bonds, contracts, and assurances whatsoever, made after the time aforesaid, for payment of any principal, or money to be lent, or covenanted to be performed upon or for any usury, whereupon or whereby there shall be reserved or taken above the rate of 5*l.* in the hundred, as aforesaid, shall be utterly void." /

Lowe v. Waller, Dougl. 708—736. The defendant was acceptor of a bill, which he gave to Harris and Stratton upon an usurious contract; Harris and Stratton indorsed it to the plaintiff for a valuable consideration, and the plaintiff had no notice of the usury; upon a case reserved, the question was, whether the usury between Harris and Stratton and the defendant was a defence against an indorsee who took the bill *bonâ fide*, and paid a valuable consideration for it; and after time taken to consider, the Court held it was; and though Lord Mansfield had a wish the law should turn out in favour of the plaintiff, the Court found the words of the act too strong, and could not get over the case of *Bowyer v. Bampton*, Str. 1155, *suprà*, n. (70).

(72) By 45 Geo. 3. c. 72. (which repeals the former act 43 Geo. 3. c. 160. relating to the same subject) sect. 16., it is enacted, "That it shall not be lawful for any of his Majesty's subjects to ransom, or to enter into any contract or agreement for ransoming, any ship or vessel belonging to any of his Majesty's subjects, or any merchandise or goods on board the same, which shall be captured by the subjects of any state at war with his Majesty, or by any persons committing hostilities against his Majesty's subjects, unless in the case of extreme necessity to be allowed by the Court of Admiralty."

And by sect. 17. "All contracts and agreements which shall be entered into, and all bills, notes, and other securities which shall be given by any person or persons for ransom of any ship or vessel, or of any merchandise or goods on board the same, contrary to this act, shall be absolutely null and void in law, and of no effect whatsoever."

(73) *Webb v. Brooke*, 3 Taunt. 6. The plaintiff and defendant (British subjects) were made prisoners by the French at

tain the ransom, of the ship or vessel of any British subject, or any merchandise or goods on board the same, as before mentioned.

Where usury is the defence, letters between the parties at the time the bill or note is given, to fix the usurer's terms (74), are admissible in evidence against a subsequent holder, if the usury be as against him a valid defence.

Oporto, where the defendant's ship was at the same time taken; they jointly petitioned for the release of themselves, and for the ransom of the defendant's ship, and to enable the defendant to pay for the ransom, the plaintiff lent him 3000 dollars, and for this sum the defendant drew a bill in his own favour, which he indorsed to the plaintiff. Their liberation and the ransom were accordingly effected, and they returned (as had been agreed upon) in the ship to England. The drawee refused to accept the bill, and this action was brought against the defendant as indorser. The defence was, the illegality of the purpose for which the money was lent. A verdict was found for the plaintiff, and the point of law reserved. And after a rule nisi to enter a nonsuit, and cause shown, Mansfield C. J. said, "there is a manifest distinction between the cases of *Faikney v. Reynous*, and *Petrie v. Hannay*, and the other cases, in which a man having a debt of honour borrows money to pay it, and those cases where the plaintiff previously advances the money for effectuating an illegal transaction, or causing it to be done. Here the plaintiff and the defendant are equally ransomers; equally solicitous to procure the ransom, for they were to return home by this ship. The ransom is as much the deed of the plaintiff as of the defendant." Rule absolute.

(74) *Kent v. Lowen*, 1 Campb. N. P. C. 177, 180. d. This was an action against the maker of a note, indorsed by the payees to Watson, and by him to the plaintiff. The defence was, usury in the original consideration for the note; to prove which, the defendant tendered letters from the payees to the defendant setting forth the consideration. Lord Ellenborough

But, now, 58 G. 3. c. 93., removes the objection of usury from an indorsee for valuable consideration, if he were ignorant of the usury at the time he took the bill or note and gave the consideration. (75)

It is for the indorsee, however, who sues upon an usurious bill or note, to prove that he is an indorsee for value. (76)

And this he must do, though he have had no notice to prove the consideration of the indorsement to him. (76)

held that it was first necessary to show, either by the post-mark or otherwise, that the letters were contemporaneous with the making of the note, after which, they would be evidence of an act done by the payees through whom the plaintiff claimed. From the post-mark it appeared that they had been written just before the date of the note, and they were read in evidence. The defendant had a verdict; and on a motion for a new trial, the Court held that the letters had been properly received.

(75) By 58 G. 3. c. 93., no bill or note that shall be made after 10th June, 1818, shall, though it may have been given for an usurious consideration, or upon an usurious contract, be void in the hands of an indorsee for valuable consideration, unless such indorsee had, at the time of discounting or paying such consideration for the same, actual notice that such bill or note had been originally given for an usurious consideration, or upon an usurious contract.

(76) *Wyatt v. Campbell*, 1 Moody & Malkin, 80. In an action by the indorsee of a note it appeared that a prior indorser had discounted it usuriously, and plaintiff was, therefore, called upon to prove the consideration of the indorsement to him: he had had no previous notice to prove it, and insisted he was not bound to do so: but Lord Tenterden said that "58 G. 3. made "notes tainted with usury valid in the hands only of a bona fide "holder (that is, an innocent holder for value); the onus, there-

If the consideration upon which a bill or note was made be not illegal, an illegality in the consideration upon which it is afterwards transferred will be no (77) defence, if the plaintiff took it *bonâ fide*, and upon a good consideration, and if he be not bound in making out his title to state or prove the signature of the person making such transfer.

Where he is bound to state or prove such signature, the authorities are contradictory upon the question whether the illegality is a defence or not.

If the bill or note were originally given upon an unobjectionable consideration, but indorsed over by the payee upon an illegal consideration, Lord Kenyon thought a subsequent indorsee, if he took the bill *bonâ fide* and upon a valuable consideration, was entitled to keep it in opposition to such payee; (78)

“fore, to prove himself such was upon plaintiff, and if he did “not, the statute did not apply.” Plaintiff did not establish a consideration, and defendant had a verdict.

(77) *Daniel v. Cartony*, post, p. 523.

(78) *Parr v. Eliason*, 1 East's Rep. 92. A bill was drawn in favour of the plaintiff; he indorsed it to Persent and Bodeker upon an usurious consideration, and they indorsed it over: it was afterwards indorsed back to the assignees of Persent and Bodeker, who had become bankrupts, for a debt due to their estate; upon which, the plaintiff brought trover to recover back the bill. Lord Kenyon directed a nonsuit, and after a rule nisi for a new trial, the Court held, that as the bill was originally good, and as the indorsement by Persent and Bodeker was unimpeached, their indorsee had a good right to the bill, and that right was transferred to the defendants. Rule discharged.

And to enforce payment in case of a bill, against the acceptor. (79)

In Lord Ellenborough's time, the Court of King's Bench thought he could not enforce such payment. (80)

It is no objection in an action against an indorser that the bill or note was drawn upon a gaming, or usurious, or other illegal consideration ; for, though

(79) *Daniel v. Cartony, Espinasse*, 274. Scott drew a bill on the defendant payable to his own order, and discounted it with Greensill, who took 18*l.* per cent. discount ; it was afterwards indorsed to the plaintiff, and the defendant could not impeach *that* transaction ; and per Lord Kenyon, " This is no defence ; had the note been originally given on an usurious transaction, or for an usurious consideration, it would have been void in the hands of even a *bonà fide* holder ; but usury in an intermediate transaction respecting it can never make it void in the hands of a *bonà fide* indorsee, where there was no usury in the original transaction."

(80) *Lowes v. Massaredo*, 1 Stark. 385. In an action by indorsees against acceptor on a bill payable to Lowes or order, it appeared that Lowes indorsed it to Bloxham upon usurious terms, that Bloxham indorsed it to Ambrose, and that Ambrose indorsed it to the plaintiffs upon questionable terms ; Lord Ellenborough thought plaintiffs precluded from recovery by the usury between Bloxham and Lowes, independent of the usury between them and Ambrose ; but, upon being strongly pressed by *Parr v. Eliason*, he suffered plaintiffs to take a verdict, subject to a motion for entering a nonsuit ; a rule nisi was accordingly granted, and on cause shown, the Court thought the usury between Bloxham and Lowes a bar to the plaintiff's claim ; because, they could not bring themselves in connection with the defendant but through the medium of Lowe's indorsement, which was tainted with usury ; they also thought the terms upon which Ambrose indorsed to the plaintiffs usurious, and the rule for a nonsuit was made absolute.

the statute against gaming, &c. make such bill void to all intents and purposes, the proper construction upon those words is, that it makes it void as far as can be necessary to further the objects of the act, but it does not avoid it in favour of a party whom the statute meant to punish, not to protect. (81)

Another ground of defence to an action on a bill or note is, that it had been stolen or lost, or unlawfully obtained, and that plaintiff had taken it without proper caution. (82)

(81) *Edwards v. Dick*, 4 B. & A. 212. Action on bill drawn by defendant on Lord Rossmere, payable to defendant's order, and indorsed by him; defence, that defendant drew the bill for money won by him of Lord Rossmere at play. Bayley J. thought this no defence; because, by indorsing the bill defendant affirmed it to be free from exception, with which this defence was inconsistent, and he rejected the evidence. On motion for new trial, the Court thought he did right, for defendant was not within the spirit of the act against gaming; it was not for a person standing as he did that the act intended protection; compelling payment from him was not advancing any practice the statute meant to suppress; and giving him protection would assist a winner, whom the act meant to discountenance, and would enable him to set up his own misconduct to bar the honest claim of an innocent indorsee. Rule refused.

(82) See *Miller v. Race*, and *Grant v. Vaughan*, *antè*, p. 130. n. 24., and *Peacock v. Rhodes*, *antè*, p. 128. n. 12.

Solomons v. the Bank of England, 13 East's Rep. 135. n. Trover for a bank note for 500*l.* It appeared that the note had been fraudulently obtained by means of a forged draft, and therefore when presented for payment it was stopped by the Bank, who informed the plaintiff of the circumstances. The plaintiff had received it from his correspondent at Middleburgh, and by desire of the Bank, wrote to them to learn how they

To make out that it had been stolen or lost, it is not necessary defendant should give positive evi-

came by it. In answer, they wrote that they had received it, in payment for goods, from a stranger. The note was three years old, and was stated by the plaintiff to have been taken by him in reduction of a balance due to him from his correspondents, but how this was did not appear. Bank notes of this value were not usually current at Middleburgh. Lord Kenyon said that as it did not appear that the plaintiff had given a valuable consideration for the note before notice, he should consider him as agent to his correspondents, and he thought that they had not satisfactorily accounted for their possession of the note. The plaintiff consented to a nonsuit; and on a rule nisi to set it aside and cause shown, the Court refused to interfere. See *Lowndes v. Anderson*, 13 East's Rep. 130.

Gill v. Cubitt, 3 Barn. & Cres. 466. In an action by indorsee against acceptor, it appeared a bill had been stolen out of a parcel, and plaintiff was, therefore, called upon to prove under what circumstances he took it: he proved that he was himself a bill broker, that the bill was brought in his absence to his clerk for discount: that it was brought between nine and ten in the morning: that the clerk thought he knew the features of the man who brought it from having seen him before, but he did not know his name or where he lived: the clerk desired him to leave the bill, that he might inquire as to the names upon the bill, and call again: that the inquiry was made, the man called again in two hours and got the money, and by the clerk's desire put his name upon the bill. The clerk did not ask the man his name, or where he lived, or on whose account he came, or where he got the bill: and it was not the practice in plaintiff's office to enquire about the drawer or any other party, if the acceptors were good. Abbott C.J. asked the jury what they would think if a board were put over plaintiff's door, "Bills discounted for persons whose features are known, and no questions asked," (and the Court thought the facts warranted the question,) and he left it to the jury, whether it was proper caution to discount a bill for a man whose name and residence were unknown, and inti-

dence of the theft or loss, if he were the person from whom it was stolen, or by whom it was lost ;

mated pretty strongly it was not ; the jury found for defendant, and on rule nisi for new trial and cause shown, the Court thought the case properly left to the jury, and the conclusion drawn by the jury right : rule discharged.

Snow and others v. Peacock, 2 Car. & P. 215. 3 Bing. 406. In trover for a 500*l.* bank of England note, it appeared that in September 1824, plaintiffs' porter was robbed of it. Plaintiffs made immediate complaint at Bow Street, had hand-bills and placards published, gave notice to stop payment at the bank, and advertised the number, date, and amount in the Hue and Cry, (a paper circulated by the Home Secretary of State for giving notice of offences.) In April 1825 it was taken to the bank at Bourne in Lincolnshire by a respectable looking man, who had arrived at Bourne two hours before by the London mail. A clerk at the bank asked the prisoner's name, and then gave him the amount in notes of the bank ; he asked no other questions. The clerk, in a service of eleven years, had never changed a note so large as 200*l.* Best C. J. left it to the jury, whether plaintiff had acted with due diligence in circulating intelligence of the robbery, and whether defendant's clerk had exercised sufficient caution and observed the usual course of business in giving change for the note. The jury found for plaintiffs, but added that they had not the slightest suspicion of defendant's motives. A new trial was applied for on the ground that the proper question for the jury was whether defendant had acted *bonà fide*, but after cause shown, the Court held the proper question was, whether defendants had used sufficient caution, and the rule for a new trial was discharged.

Beckwith v. Corral, 3 Bing. 444. 23d December, plaintiff was robbed of his pocket-book, containing (among other things) a bill accepted by Remington and Co., and indorsed in blank by the payee. On 26th December, he advertised the loss of the pocket-book, but said nothing as to the bill, and on the contrary stated, that the contents were of no use but to the owner. On the 30th, he gave notice to Remington and Co. and desired them to stop the bill. In the mean time, viz. on

for, that may lie in his own knowledge only : proof that he took the steps a man naturally would take

29th, two young men, strangers, went to defendant's bank at Maidstone, and asked to have the bill cashed. One of them said he was the indorser's son ; defendant cashed the bill, and plaintiff brought trover. Best C. J. put it to the jury, whether plaintiff used due diligence in apprising the public of the loss, and whether defendant had acted with good faith and sufficient caution in taking the bill. The jury found for the defendant. Motion for new trial, on the ground that the only proper question was, whether defendant had used due caution and acted *bonâ fide*, and that it was immaterial whether plaintiff had used due diligence or not. But the Court thought plaintiff bound to give notice of his loss as extensively as possible ; here he had rather misled than cautioned the public. Rule refused.

Down v. Halling, 4 Barn. & Cres. 330. 16th November, plaintiff's broker gave plaintiff a cheque upon Pole and Co. bankers, for 50*l.* : 22d November, between four and five p. m., a woman of respectable appearance bought goods of defendants, wholesale linen drapers and haberdashers, to the amount of 6*l.* 10*s.*, and gave them this cheque : they asked her name and wrote it down, and gave her the change : the next day they presented it for payment, and the bankers paid it. On the 25th, plaintiff gave notice to the bankers not to pay it, but finding it had been paid, called on defendant, and brought this action for money had and received. Abbot C. J. left it to the jury, whether defendants had not taken the cheque under circumstances which should have excited the suspicion of a prudent man, and they found for defendant. On motion for new trial the Court were satisfied that if this was to be considered as lost by plaintiff or stolen from him, defendant, who took it so long after its date, must be considered as having taken it at his peril : they, however, doubted whether plaintiff should not have given some evidence of losing the cheque ; but, on time to consider on that point, they thought a person who took such a cheque under such circumstances was bound to show that the party from whom he took it had good title to it ; and Abbott C. J.

in case of theft or loss, will furnish ground for a jury to conclude it had been stolen or lost. (83)

And though there be positive evidence of the theft or loss, the defendant should be prepared to show that proper steps were taken to notify the theft or loss, and to put the public on their guard; for, want of diligence in this respect may take away from the loser the right of imputing want of proper caution to the plaintiff (84);

Or, at least, it will weaken the defence.

A fortiori will it, if the loser in the steps he takes do what might rather allay suspicion as to the bill or note in question, than raise it. (85)

As, if he stated that he had lost a parcel, or pocket-book, &c. and that the contents were of no use but to the owner. (85)

In case of a bank-note, notice at the Bank to stop it, advertising in the Hue and Cry, and distributing placards in London and its vicinity (where the loss is in London), and amongst many country bankers (though not all) is sufficient to exempt the loser from the charge of negligence. (86)

And it will make no difference, though plaintiff were a country banker, to whom no placard was sent.

remarked that the party who lost it might in many instances be unable to prove such loss. Rule refused.

(83) See *Down v. Halling*, antè, p. 527.

(84) See *Snow v. Peacock* and *Beckwith v. Corral*, antè, p. 526.

(85) See *Beckwith v. Corral*, antè, p. 526.

(86) See *Snow v. Peacock*, ante, p. 526.

If the loss be made out, the burden of proof that he or some one under whom he claims gave a valuable consideration for it, and took it under circumstances in which no want of proper caution is imputable, lies upon the plaintiff. (87)

Want of proper caution is the proper point for consideration: it is not necessary there should be *mala fides*. (88)

And it is for a jury to say whether there has been proper caution or not. (89)

The amount of the bill or note may be proper for consideration in judging of the want of caution: greater caution may be expected upon a large bill or note than upon a small one. (90)

In case of a cheque upon a banker, the date of the cheque may be proper for consideration: greater caution may be thought right if the cheque be of several days' standing, than if it be taken within a day or two of the date. (91)

There is not necessarily want of caution in taking a cheque upon a banker five days after the date. (92)

(87) See *Down v. Halling*, *suprà*.

(88) See *Snow v. Peacock*, and *Gill v. Cubitt*, *suprà*.

(89) See *Gill v. Cubitt*, *suprà*. *Rothschild v. Corney*, *infra*.

(90) See *Snow v. Peacock*, *suprà*.

(91) See *Down v. Halling*. *Solomons v. Bank of England*, *suprà*.

(92) *Rothschild v. Corney*, 9 Barn. & Cres. 388. Brady, a wine merchant and cooper, had in his possession, 24th January, two cheques of plaintiff's upon his bankers for 1330*l.* dated 19th January, with "and Co." written across them. Brady applied to one of the defendants to give him cash for them, on the ground

Although it have "and Co." written across it, to intimate it to be paid to a banker. (92)

If, therefore, the jury find that those circumstances were not such as ought to have excited the suspicion of prudent men, their verdict cannot be impeached. (92)

Discounting for a man whose name and residence are unknown, and who is only known by his features to the person discounting it, may be deemed want of caution. (93)

And so may discounting for a stranger who only gives his name. (94)

Especially, if the bill or note discounted be of large amount. (95)

that he (Brady) had no banker, which defendant had, and from the "and Co." written across, they must be presented through a banker. This defendant knew Brady by person, but not his residence, and gave him the amount, and paid the cheques to Remington and Co., their bankers, who got the amount from Masterman and Co., plaintiffs bankers; it was then discovered that these cheques had been obtained from plaintiff by fraud, and he brought this action to recover back the money. Lord Tenterden left it to the jury whether the circumstances were such as ought to have excited the suspicions of prudent men, and whether defendants had acted with reasonable caution. The jury found for defendants, and on motion for a new trial, the Court said, the question presented to the jury was the right one, and they could not say they had come to a wrong conclusion.

(93) See *Gill v. Cubitt*, *antè*, p. 525.

(94) See *Snow v. Peacock*, *antè*, p. 526. *Solomons v. Bank of England*, *antè*, p. 524.

(95) See *Snow v. Peacock*, and *Solomons v. Bank of England*, *suprà*.

Where a bill or note has been stolen or lost, it is not merely a ground of defence that it was taken without proper caution, but where the party has obtained payment upon it, he may be made to refund. (96)

And if he still have the bill or note in his possession, he may be made to give it up. (97)

Another ground of defence to an action on a bill or note is indulgence to a party to whom defendant, if he paid, would be entitled to look for reimbursement. (98)

But, indulgence pending the action cannot be given in evidence upon the general issue (99) ;

It must be specially pleaded. (99)

And so must any other ground of defence which arises after the action brought.

(96) See *Down v. Halling*, antè, p. 527.

(97) See *Snow v. Peacock*, and *Beckwith v. Corral*, antè, p. 526.

(98) See antè, pp. 212. 215. 338. to 345.

(99) *Lee v. Levi*, 4 Barn. & Cres. 390. The indorsee of a bill sued the indorser and acceptor, and pending the actions, took a warrant of attorney from the acceptor without the indorser's knowledge for payment by instalments ; and whether this was a bar to the action against the indorser was the question. On rule nisi to enter a verdict for the plaintiffs, and time to consider, the Court held it no bar on the general issue, which alone had been pleaded, and, therefore, the rule was made absolute.

CAP. XIII.

*Competence of Witnesses.**One of several Makers*, p. 532, 533.*Drawer*, p. 532 to 535.*Indorser*, p. 536 to 538.*Acceptor*, p. 533, 539, 540.

IN an action against one of several makers of a note, another maker is a competent witness for the plaintiff; for, he stands indifferent: if the plaintiff recover, he will be liable to pay contribution to the defendant; if plaintiff fail and force him to pay, he will be entitled to contribution from the defendant. (1)

It was at one time held, that no person who had signed a negotiable bill or note was admissible as a witness to impeach its validity; because, his conduct had sanctioned what his testimony would defeat.

But the contrary is now fully settled.

Thus, the drawer of a bill, dated abroad and not stamped, is a competent witness to prove that it

(1) *York v. Blott*, 5 Maule & S. 71. Assumpsit against one of two makers of a note; plaintiff called the other maker, and Graham B. admitted him: on motion for a new trial, the Court thought the witness stood indifferent, and was properly admitted, and they refused the rule.

was made in England, and, therefore, not admissible in evidence. (2)

And the only objection which can now be made against the testimony of a party to the bill or note is, that he has a direct interest in the event of the suit : if he have such an interest he is not admissible ; otherwise, he is.

Therefore, in an action against one of several makers of a note, any of the others is a competent witness for the plaintiff; for, if the plaintiff succeed in the suit, the witness will be liable to pay contribution; if the plaintiff fail in the suit and make the witness pay, the witness will be entitled to receive contribution. (3)

So, in an action against the acceptor of a bill, the drawer is a competent witness either for the plaintiff (4) or for the defendant (5) (6); for, if the

(2) *Jordaine v. Lashbrooke*, 7 Term Rep. 601. In an action against the acceptor of a bill purporting to have been drawn at Hamburg, the defence was, that it was drawn in London, and, therefore, inadmissible in evidence without a stamp : the payee and indorser was called to prove where it was drawn; but it was objected that he was incompetent. Lord Kenyon, however, admitted him; and on his testimony the defendant had a verdict upon the counts on the bill. On a rule nisi for a new trial, and cause shown, Ashhurst J. thought the witness inadmissible; but Lord Kenyon, Grose, and Lawrence Js., held that as he was neither interested in the event, nor rendered infamous by a conviction for any crime, he was properly admitted. Rule discharged. See also *Adams v. Lingard*, Peake, N. P. C. 117.

(3) See *York v. Blott*, *suprà*, n. (1.)

(4) *Dickinson v. Prentice*, 4 Esp. N. P. C. 32. This was an action against the defendant as acceptor of a bill; the defence,

plaintiff recover against the acceptor, the drawer pays the bill by the hands of the acceptor; if the plaintiff fail against the acceptor, the drawer is liable to pay the bill himself. (4)

And the drawer has accordingly been admitted for the plaintiff, to prove the defendant's handwriting; and for the defendant, to prove that (5) the plaintiff discounted the bill upon an usurious consideration, or that (6) the bill had been paid.

And it is no objection to the competence of the drawer, when called to prove the acceptor's hand-

intended to be set up, was, that the acceptance was a forgery: to prove the defendant's handwriting the plaintiff called the drawer. It was objected, that having drawn the bill, the forgery of the acceptance could only be imputable to him; and that as he might be committed for a capital offence, if the forgery were established, he had such an interest as ought to disqualify him. But Lord Kenyon said, this was matter of observation as to his credit, but no objection to his admissibility. He was admitted, and the plaintiff had a verdict. See also *Barber v. Gingell*, 3 Esp. N. P. C. 62.

(5) *Rich v. Topping*, Peake N. P. C. 224. The drawer himself had indorsed the bill to the plaintiff for an usurious consideration; he had a release from the acceptor, which Lord Kenyon thought was necessary. The reporter, however, in a note upon the case, considers that the witness stood indifferent, and ought to have been received even without a release; and in *Brard v. Ackerman*, 5 Esp. N. P. C. 119., the drawer (under precisely similar circumstances) was admitted without a release; at least, it is not stated that he had any.

(6) *Humphrey v. Moxon*, Peake N. P. C. 52. This was an action by an indorsee; and a distinction was attempted to be taken between this case, and one wherein the payee was the plaintiff; but, Lord Kenyon held that there was no difference in principle, and admitted the drawer.

writing, that he is in custody upon a charge of having forged it. (7)

But, in an action against the acceptor upon an acceptance for the accommodation of the drawer, the drawer or his wife is not, in general, a competent witness for the defendant; for, he has a direct interest to defeat the suit; because, if plaintiff recover against the acceptor, the drawer will be liable to the acceptor not only for the amount of the bill, but for all the costs the acceptor may sustain: whereas, if plaintiff fail against the acceptor, the drawer will be liable for the amount of the bill only, not for the costs. (8)

In such case, however, if the drawer have become bankrupt, and obtained his certificate, he will, since 6 G. 4. c. 16., be a competent witness for the defendant, upon giving a release to his assignees; for

(7) See *Dickinson v. Prentice*, ante, p. 533. n. (4). In *Barber v. Gingell*, 3 Esp. N. P. C. 62., the drawer was called to prove that he had paid the bill. Being at that time a prisoner on a charge of having forged the bill, and brought up by *habeas corpus*, he was objected to as incompetent; but Lord Kenyon overruled the objection.

(8) *Jones v. Brooke*, 4 Taunt. 464. Action against acceptor of a bill: the acceptance was without value, to accommodate the drawer; the drawer's wife was called as a witness for the defendant, to prove that the drawer indorsed away the bill upon an usurious consideration; the witness was objected to, but admitted: but on rule nisi, cause shown, and time to consider, the Court held the drawer had a direct interest to defeat the action; because, otherwise, he must indemnify defendant against the costs as well as pay him the amount of the bill; that the wife, therefore, was incompetent. Rule absolute.

under s. 52. of that statute, the defendant would be entitled to avail himself of the commission, and would, therefore, be barred by the certificate. (9)

In an action by indorsee of a note against an indorser, the maker is a competent witness for the plaintiff: for, if the indorser be made to pay, the maker will be liable to pay him; if the indorser be not made to pay, the maker will be liable to pay the indorsee; and his liability to the one cannot exceed in extent his liability to the other. (10)

So, in an action by indorsee against drawer or acceptor, an indorser is, in general, a competent witness either for plaintiff or defendant: for plaintiff, because, though the plaintiff's succeeding in the action *may* prevent him from calling for payment from the indorser, it is not certain that it will; and whatever part of the bill or note the in-

(9) *Ashton v. Jones*, 1 Moody and Malkin, 127. In an action by indorsee of a bill against the acceptor, the defendant called the drawer to prove usury: the acceptance was lent for the accommodation of the drawer; but, he had become bankrupt, had obtained his certificate, and released his assignees: he was objected to as incompetent; but Lord Tenterden said, defendant, if he paid, might come in under the commission by 6 G. 4.; the drawer was, therefore, discharged, and competent. He was accordingly examined, but, notwithstanding his testimony, plaintiff had a verdict.

10) *Venning v. Shuttleworth*, 24th February, 1796, at Guildhall. In an action by Venning, as indorsee of a note, against Shuttleworth as payee and indorser, the plaintiff called the drawer to prove notice to the defendant; he was objected to, but per Lord Kenyon "stat indifferenter," and he was accordingly admitted.

dorser is compelled to pay, he may recover again from the drawer or acceptor: and he is competent for defendant; because, if plaintiff fail against drawer or acceptor, he is driven either to sue the indorser or to abandon his claim.

Thus, he has been admitted, upon a bill drawn for his accommodation, to prove for the plaintiff that (11) the plaintiff gave him value for it; and he has been admitted for the defendant, to prove that he had paid the bill (12), or to prove that an unstamped bill, dated abroad, had, in fact, been made here. (13)

(11) *Shuttleworth v. Stephens*, 1 Campb. 408.

(12) *Charrington v. Milner, Peake*, N.P.C. 6. The note had been indorsed by Monk to the plaintiff, and the defendant was allowed by Lord Kenyon to call Monk, to prove that he had paid the note to the plaintiff.

Birt v. Kershaw, 2 East's Rep. 458. The defendant drew a bill in favour of Wilby, which Wilby indorsed to Glover, whose assignees now sued the defendant on the bill. The defendant called Wilby, to prove that he had paid the bill to Glover, and had been reimbursed by the defendant. It was objected that Wilby (who had no release from Kershaw) came to discharge himself, and was, therefore, interested; his evidence, however, was received, and a verdict found for the defendant. And on rule nisi to set it aside, and cause shown, the Court was clearly of opinion that this testimony had been properly admitted; that this case fell directly within the principle of that of *Ilderton v. Atkinson*, 7 Term Rep. 480.; that the witness stood indifferent. Rule discharged. Lord Ellenborough said, "It is true that in an action by the defendant against Wilby for the money received by him, if the plaintiffs recover, Wilby may also be liable for the costs of this action; but that argument was urged in *Ilderton v. Atkinson*, without effect."

(13) See *Jordaine v. Lashbrook*, *antè*, p. 533. n. (2).

So, he has been admitted for the plaintiff to prove his own indorsement. (14)

And, where the indorsement has been negatived by another witness (not being an attesting witness) whom plaintiff had called, he, or some person who saw it written, is the only witness who can be called to prove it. (15)

But, an indorser is not a competent witness for defendant, to prove that he indorsed it to plaintiff only to enable him to receive the money for such indorser: for, if plaintiff recover, it will prevent the witness from doing so; whereas, if plaintiff were defeated, he might. (16)

(14) *Richardson v. Allen*, 2 Stark. 334. In an action by indorsee against acceptor, a witness, called to prove the indorsement, said it was not the supposed indorser's writing; plaintiff then proposed to call other witnesses to prove it was, but Lord Ellenborough held, that as plaintiff was not obliged to have called the witness he did, from his being an attesting witness, it was not competent for him to call other witnesses to contradict him; plaintiff then proposed to call the indorser himself, and Lord Ellenborough thought he might; because, he could speak from knowledge, other witnesses from belief only, and he came to charge himself: he was examined accordingly, but negatived the handwriting; and plaintiff was nonsuited.

(15) See *Richardson v. Allen*, *supra*.

(16) *Buckland v. Tankard*, 5 Term Rep. 578. Action by an indorsee against the acceptor of a bill. The bill was drawn by Gregson payable to his own order, and indorsed by him in blank; and the defendant called Gregson to prove that he had indorsed and delivered it to the plaintiff, that he might get it paid, and not to give him any interest in it; and that he had no consideration for it, and was still entitled to it. The witness had a release from the acceptor. Lord Kenyon thought him

In an action against the drawer of a bill, the acceptor is not a competent witness for defendant, to prove that the plaintiff obtained the bill from the acceptor upon a promise to get it discounted, and that the plaintiff had never done so : for, the acceptor would be liable to indemnify defendant against the costs as well as against the amount of the bill, and would, therefore, have a direct interest against the plaintiff to the extent of such costs. (17)

And the rule that he ought to be admitted as a witness *of necessity* does not apply. (17)

In an action against the drawer of a bill, it has

interested, and rejected him. And on a rule nisi for a new trial, the Court held, that his situation would be better or worse according to the event of the verdict, and, therefore, that he was properly rejected. Rule discharged.

(17) *Edmonds v. Lowe*, 8 Barn. & Cres. 406. In an action by indorser of a bill against the drawer, defendant offered to call the acceptor, to prove that defendant put the bill into his hands to get it discounted, that the acceptor put it into plaintiff's hands, to whom he owed 70*l.*, that the plaintiff was to get it discounted, and retain his 70*l.*; but that plaintiff never had got it discounted; and that the consideration upon which it had been handed to him had, therefore, wholly failed. Lord Tenterden thought him incompetent, and rejected him, and on rule nisi for new trial, and cause shown, the Court thought him rightly rejected: he was liable upon the bill, and there was an implied undertaking that he would indemnify defendant; and under that undertaking he would be liable, not merely for the amount of the bill, but for the costs; and by defeating plaintiff's claim, he would free himself from payment of those costs. It was pressed that he was a witness of necessity, but the Court said, that exception applied only to agents employed in the ordinary transactions of commerce. Rule discharged.

been held that the acceptor is not a competent witness for defendant, to prove a set-off, on the ground that he is answerable to the drawer only to the amount to which plaintiff recovers against defendant. (18)

But, if the drawer be protected against the holder by a cross-demand he has against the holder, *quære*, whether such cross-demand, when set off, is not equivalent to payment? and will not the drawer be entitled to call upon the acceptor for the full amount of the bill, as much as if he had paid the full amount in money?

(18) *Mainwaring v. Mytton*, 1 Stark. 83. In an action against the drawer of two bills, he called the acceptor to prove that the acceptor had indorsed to defendant a bill drawn by him on the plaintiff, and accepted by plaintiff, and that defendant was, therefore, entitled to set off this acceptance. Objection being made to his competence, it was urged that he was indifferent, for if plaintiff failed against the drawer, he might sue the witness; but Dampier J. said, the witness was interested in lessening the balance, being answerable to defendant for what plaintiff should recover; and he was rejected, and plaintiff recovered his whole demand.

C A P. XIV.

*Forgery of Bills or Notes.**Altering*, pp. 542. 544. 547 to 549.*Adding*, pp. 545.*Assuming the Character of a Person of the same Name*, pp. 545. 549, 550.*Assuming a false Name*, pp. 545. 551 to 553.*Using a fictitious Name*, p. 545.*Procuring another to forge*, p. 553.*or utter*, pp. 553, 554.*Uttering*, p. 554.*Disposing of*, pp. 555, 556.*Instrument*, p. 566 to 560.*without Stamp*, p. 560.*Intent*, p. 560.*Indictment*, p. 561.*Evidence*, p. 564.*Witnesses*, p. 569.

FORGING, or causing to be forged, or assisting in forging, any bill or note, or any indorsement or assignment thereof, with intention to defraud any person whatever; or uttering the same as true, knowing it to be forged, with a like intent, was made a capital offence by 2 G. 2. c. 25. (1)

(1) By 2 Geo. 2. c. 25. s. 1., (made perpetual by 9 Geo. 2. c. 18.,) "if any person after 29th June, 1729, shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly act or assist in the false

This act did not extend to Scotland. (2)

By 7 G. 2. c. 22., it is applied to acceptances, and the term *alter* is used as well as *forged*. (3)

By 31 G. 2. c. 22. s. 78., (4) the second of

making, forging, or counterfeiting, (amongst other things,) any bill of exchange or promissory note for payment of money, or any indorsement or assignment of any bill of exchange or promissory note for payment of money, with intention to defraud any person whatsoever; or shall utter or publish as true any false, forged, or counterfeit bill of exchange or promissory note for payment of money, or any indorsement or assignment of any bill of exchange or promissory note for payment of money, with intention to defraud any person, knowing the same to be false, forged, or counterfeited; then every such person shall be deemed guilty of felony, without benefit of clergy."

(2) By s. 4. of the same statute it is provided, that nothing in that act contained shall extend to that part of Great Britain called Scotland.

(3) By 7 Geo. 2. c. 22., which recites that by 2 Geo. 2. c. 25., no punishment is inflicted upon any person who shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged or counterfeited, or willingly act or assist in the false making, altering, forging, or counterfeiting, any acceptance of any bill of exchange, or who shall knowingly utter or publish the same as true: it is therefore enacted, "that if any person, after the 24th day of June, 1734, shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, or counterfeited, or willingly act or assist in the false making, altering, forging, or counterfeiting any acceptance of any bill of exchange with intention to defraud any person whatsoever; or shall utter or publish as true any false, altered, forged, or counterfeited acceptance of any bill of exchange, with intention to defraud any person, knowing the same to be false, altered, forged, or counterfeited; then every such person shall be deemed guilty of felony, without benefit of clergy."

(4) By 31 Geo. 2. c. 22. § 78., which recites that doubts might

G. 2. is extended to cases where the intent is to defraud, not an individual, but a corporation; and by 18 G. 3. c. 18., (5) the seventh of G. 2. c. 22. is in like manner extended.

arise whether the punishment inflicted by 2 Geo. 2. c. 25. extends to the commission of forgeries with intention to defraud any corporation, it is enacted, "that if any person from and after the 1st of July, 1758, shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly act or assist in the false making, forging, or counterfeiting, any bill of exchange or promissory note for payment of money, or the indorsement or assignment of any bill of exchange or promissory note for payment of money, with an intention to defraud any corporation whatsoever; or shall utter or publish as true, any false, forged, or counterfeited bill of exchange or promissory note for payment of money, or the indorsement or assignment of any bill of exchange or promissory note for payment of money, with intention to defraud any corporation, knowing the same to be falsely forged or counterfeited: then every such person shall be deemed guilty of felony, without benefit of clergy."

(5) By 18 Geo. 3. c. 18., which recites that doubts had arisen whether the punishment inflicted by 7 Geo. 2. c. 22. extended to such forgeries when committed with an intention to defraud any corporation, it is enacted, "that if any person after the 25th of March, 1778, shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged or counterfeited, or willingly act or assist in the false making, altering, forging, or counterfeiting, any acceptance of any bill of exchange, with intention to defraud any corporation whatsoever; or shall utter or publish as true any false, altered, forged, or counterfeited acceptance of any bill of exchange, with intention to defraud any corporation whatsoever, knowing the same to be false, altered, forged, or counterfeited; every such person, being thereof lawfully convicted, shall be deemed guilty of felony, and shall suffer death as a felon without benefit of clergy."

And by 45 G.S. c. 89., (6) forging or altering or causing to be forged or altered, or willingly acting or assisting in the forging or altering, any bill or note, or any indorsement or assignment or acceptance thereof, with intent to defraud any person or body politic; or offering, disposing of, or putting away, any such forged or altered bill, note, indorsement, assignment, or acceptance, with a like intent, knowing it to be forged or al-

(6) By 45 Geo. 3. c. 89. s. 1., which recites 2 Geo. 2. c. 25. and certain other acts, and states that certain provisions had been made and enacted for the preventing and punishing the forgery of bank notes, and other notes, bills, and instruments, in those acts respectively mentioned; and that it was expedient that such provisions should extend and be in force in every part of Great Britain, with such alterations and amendments therein as were thereby made; it is enacted, "that if any person or persons shall, from and after the passing of this act, falsely make, forge, counterfeit, or alter, or cause or procure to be falsely made, forged, counterfeited, or altered, or willingly act or assist in the false making, forging, counterfeiting, or altering (among other instruments) any bill of exchange, promissory note for payment of money, indorsement or assignment of any bill of exchange or promissory note for payment of money; or acceptance of any bill of exchange with intention to defraud any person or persons, body or bodies politic or corporate whatsoever; or shall offer, dispose of, or put away any false, forged, counterfeited, or altered bill of exchange, promissory note for payment of money, indorsement or assignment of any bill of exchange or promissory note for payment of money, or acceptance of any bill of exchange, with intention to defraud any person or persons, body or bodies politic or corporate, knowing the same to be false, forged, counterfeited, or altered, then every person or persons so offending shall be deemed guilty of felony, without benefit of clergy."

tered; is a capital offence: and this act extends to every part of Great Britain. (7)

By 43 G. 3. c. 139. s. 1., forging or uttering any bill or note purporting to be the bill or note of any foreign prince, state, or country, or of any person or company of persons residing in any foreign country, or of any body corporate, or body in the nature thereof, constituted by any foreign prince or state, with intent to deceive his Majesty, or any such foreign prince, &c. or any person or body politic here or abroad, is made a felony, and punishable by transportation for a term not exceeding fourteen years.

There are other provisions as to bank notes, bank post bills, and certain other securities, as to which the different statutes which refer to them must be consulted.

Forgery may be committed either by altering or adding to what has a genuine signature, or by introducing a false signature.

And a signature will be false, though in a man's own name, if he attach to it or adopt the description or addition of any other person of the same name. (8)

And a signature in a false name assumed for the purpose, or in the name of a non-existing person,

(7) By 45 Geo. 3. c. 89. § 8., "all and every the clauses and provisions in this act contained, shall extend to every part of Great Britain."

(8) *Rex v. Webb*, post, p. 549.

will be as much a forgery as a signature in the name of an existing person. (9)

Misapplying a genuine signature, by writing over it a bill or note for which it never was intended, so as to give it the appearance of the signature to such bill or note, is a forgery. (10)

And so is misapplying a genuine signature so as to give it the appearance of an acceptance or indorsement. (11)

(9) *Rex v. Francis*, Mich. 1811. John Francis took a lodging in the name of Cooke; and in less than a month passed to his landlord's wife a draft he drew on Praeds and Co. for 15*l.*, and she gave him a bank note for it to that amount. It was returned, on the ground that no person of that name kept cash there: the prisoner said it was a mistake for want of his adding "*jun.*" to his name; which he accordingly added, and the note was again taken to Praeds, who again refused payment; but before it was brought back the prisoner absconded. *Chambre J.* left it the jury whether he did not assume the name of Cooke, or at least of Cooke, *jun.*, with intent to defraud his landlord; and the jury thought he did, and he was convicted. On case, the conviction was held right.

(10) *Rex v. Hales*, 17 St. Tr. 161. Hales got a genuine signature of Thomas Gibson, and wrote over it a promissory note for 6400*l.* He was indicted for forging the note, and for uttering it knowing it to be forged; and upon a trial before *Page J.* and *Carter B.*, the objection was taken, that as the signature was genuine it could not be called a forged note; but the objection was over-ruled, and defendant was convicted.

(11) *Rex. v Hales*, 17 St. Tr. 209. The same defendant was afterwards tried before *Pengelly C. B.*, *Reynolds J.*, and *Sir William Thompson*, for forgery upon a piece of paper containing a genuine signature of Samuel Edwards, by writing on the other side of the paper a note for 800*l.* payable to Samuel Edwards or order, and writing over the signature of Samuel

Altering a bill or note from a lower to a higher sum is a forgery; the instrument, as altered, is a false instrument. (12)

Edwards "Pray pay the value of this to _____ for value received," so as to make the genuine signature of Samuel Edwards appear to be the indorsement of this note. The indictment was for forging the indorsement, and the Court treated it as clear that this was to be deemed a forged indorsement.

The same point occurred in the *Rex v. Hales*, 17 St. Tr. 229. as to a note for 1260*l*.

These offences were prior to 2 G. 2. when the forging and uttering was a misdemeanor only, and it was probably on account of these forgeries that that statute was made.

The genuine signature in each of these cases was intended for a frank, and at that time the signature alone was sufficient for the frank.

(12) *Rex v. Teague*, Mich. 1802. Prisoner altered a 10*l*. country bank bill to 50*l*.; it was on a sixteen-penny stamp, and had been thrice paid and reissued. The indictment charged, first, that the prisoner forged the bill; and, secondly, that he uttered it knowing it to be forged: two objections; first, that the charge should have been for altering; and, secondly, that this being a bill, not a note, could not legally be reissued without a new stamp. Prisoner was convicted, and the judges held the conviction right.

Rex v. Elsworth, Pasch. 1781. An indictment stated that a bill was drawn for 8*l*.; that persons unknown feloniously did alter it, by falsely forging and adding a cipher to the 8*l*. and a *y* to the eight; that the prisoner had in his possession the said false, forged, altered, and counterfeited bill, and that he feloniously did utter as a true bill, the said false, forged, altered, and counterfeited bill, with intent, &c., and knowing, &c. Motion in arrest of judgment, on the ground that the forgery was stated to be by persons unknown, and that the statement should have been that they feloniously *forged*, not that they feloniously *altered*; the statute 2 Geo. 2. c. 25. s. 1. making it capital to

Discharging one indorsement and inserting another, is altering the indorsement ; (13) (14)

And forging it.

And discharging an indorsement by chemical means is rasing it. (14)

And what is written on the face of the bill may be deemed an indorsement. (14)

forge, but saying nothing as to altering ; but it was answered that the *altering* was *forging*, and the judges were unanimous that the conviction was right.

And see *Rex v. Post*, *antè*, p. 11.

(13) *Rex v. Birkitt*, July, 1813. After conviction generally upon a bank indictment, it appeared there was one count only upon which the conviction could be supported ; that count stated that the prisoner had in his possession a bank bill of exchange with a falsely altered indorsement thereon, and that he disposed thereof. The genuine indorsement was by Grant, Burbey and Co., to Ladbroke and Co. ; the prisoner discharged the whole of that indorsement, and wrote *de novo*, " Grant, Burbey and Co. ;" the judges thought this alteration made the bill what the indictment described it, and that on this count the conviction was right.

(14) *Rex v. Bigg*, 3 P. Wm. 419. By 8 & 9 W. 3. c. 20. s. 36., altering or raising any indorsement on any bank bill or note of any sort is made felony, without clergy. Upon a bank note for 100*l.* the bank paid 90*l.* and wrote upon the face of the note in red ink, " paid ninety pounds ;" this writing the prisoner discharged by some liquid, probably lemon-juice : indictment thereon. The indictment stated that *quoddam scriptum, anglicè* an indorsement, on the said note, was duly made, specifying that 90*l.* was paid, and that the prisoner feloniously erased that indorsement ; special verdict, finding (*inter al.*) that at the time of the act and till the 28th Nov. 1696, the only way used for indorsing bank notes, was, by writing in black ink on the back side of the notes, but from the 28th Nov. 1696, it was by writing in front in red ink ; special verdict. Many objections were taken ; one, that this was not an indorsement : after argu-

If a bill or note import to be payable at any of several places, substituting a new place for one of those named, if with intent to defraud, is a forgery. (15)

Substituting the new place, by introducing over the old one a piece of paper containing the new one, is a forgery. (15)

If there be two persons of the same name, but of different descriptions or additions, and one sign his name with the description or addition of the other, it is a forgery. (16)

Thus, if a bill be addressed to A. B. of London, merchant, and A. B., not of London, or not a merchant, accept it, the acceptance will be a forgery, if there be any A. B. of London, merchant (16);

If there be no person of that name, description, and addition, it will not. (16)

ment, the judges differed, but the majority held the conviction right. The prisoner was transported, not executed.

(15) See *Rex v. Treble*, *antè*, p. 115.

(16) *Rex v. Webb*, Mich. 1819. A bill was addressed to Thomas Bowden, baize manufacturer, Rumford, and prisoner uttered it with an acceptance thereon made by a Thomas Bowden, who did not live at Rumford, and was not a baize manufacturer; and on indictment for uttering a forged acceptance, it appeared that there was no such baize manufacturer at Rumford: on case, the majority of the judges held that the adopting a false description and addition, where a false name was not assumed, and where there was no person answering that description or addition, was not a forgery; and the prisoner was pardoned.

So, if a man of the same name as the payee or special indorsee of a bill or note indorse the bill or note, such indorsement is a forgery ; because, an indorsement by any other person than the right, is a false indorsement. (17)

But, if the real payee or indorsee of a bill or note indorse his own name thereon, without any false description or addition, his assuming at the time he utters it to be a different person of the same name, but with a different description or addition, will not make his signature a forgery, nor his uttering a capital offence.

If the signatures to a bill or note be genuine, a false pretence by the person who utters it that he bears a character he does not, will not make him liable to a prosecution for forgery. (18)

So, as to any other genuine signatures upon a bill or note, though they may be intended to be passed as and for the signatures of other persons, and are passed accordingly, yet if there be nothing

(17) See *Mead v. Young*, ante, p. 134.

(18) *Rex v. Hevey*, Hil. 1782. The prisoner uttered a bill purporting to be payable to Bernard M'Carthy or order, and having the indorsement " B. M'Carthy " thereon : he was indicted for forging that indorsement, and uttering it knowing it to be forged : the jury found that there was such a man as B. M'Carthy, and that the indorsement was his hand-writing, but that the prisoner passed himself off as that B. M'Carthy when he uttered the bill : and on case, the judges were unanimous that as the indorsement was not forged, the prisoner was not liable to be convicted.

upon the bill or note to apply them to those persons, they are not forgeries.

A signature in an assumed name is a forgery, if the name were assumed to defraud in that particular instance (19);

(19) *Rex v. Marshall*, Michaelmas, 1804. Prisoner was paying away a bill payable to Ward, or order, and indorsed by Ward, and was desired to put his name upon it, and he wrote, Luke Marsden, when his real name was Thomas Marshall: he paid the bill to Harland for a horse: Harland did not know him before, but supposed from his writing it that Luke Marsden was his name. Question for the judges whether this was forgery, and they held it was.

Rex v. Whiley, Trinity, 1805. Whiley assumed the name of Milward 27th of December, and ordered goods of Thurston in that name: on 5th January following he gave Thurston a draft in the name of Milward, on Stephenson and Co., for ten guineas more than the amount of the goods, and Thurston gave him the difference. Thurston would have trusted the prisoner equally if he had used his own name: the draft was not paid, and prisoner was indicted as for a forgery. Thompson B. left it to the jury, whether the prisoner assumed the name of Milward, when he ordered the goods and gave the note, with intent to defraud the prosecutor: they found that he did, and on case, the judges held the conviction right.

Rex v. Dunn, Michaelmas, 1765. Indictment that prisoner forged a note for payment of money, the tenor of which was as follows: "London, 27th July, 1765. I promise to pay Mr. Edward Hooper the sum of three pounds thirteen shillings and sixpence, or order, seven days after date, value received by me Mary \times Wallace, her mark," with intent to defraud Edward Hooper: it appeared that her real name was Dunn; that she assumed the name of Wallace to represent herself as a seaman's widow; that she got three guineas and a half of Hooper, a navy agent, under that pretence, and that he wrote the note in question as a security for it, and she put her mark to it; that he then asked her what name he should put to her

Or for a system of fraud within which that signature fell. (20)

And it makes no difference, though the bill or note would have been equally taken had the party used his own name. (21)

mark, and she said "Mary Wallace;" upon which he wrote "Mary Wallace, her mark." The recorder doubted whether this addition after her signature could be deemed part of the note she forged; but Perrot B. and Aston J. held it was. Case on the ground that this was the prisoner's own note, and offered as her own; and nine judges against Aston J. held it a case within 2 G. 2. c. 25., and that the prisoner was properly convicted.

Rex v. Toft, Pasch. 1777. A bill of exchange for 150*l.* indorsed in blank, was stolen at Leicester; the same night, the prisoner got cash for it at the Harboro' bank; but before it was cashed, he was told it was the rule of the house that the person for whom they cashed a bill should indorse it, and he wrote the name John Williams; his real name was Toft. The jury found him guilty, and the judges were of opinion it was forgery.

Rex v. Peacock, Pasch. 1814. Prisoner went to Nuneham, in Gloucestershire, with intent to defraud by getting money upon bills he should draw: he went in the name of White, and in that name drew a bill: he was indicted for forging this bill, and it was proved that his real name was Peacock; but it was not proved by what name he had passed for six years before he went to Nuneham: the jury found that he assumed that name, and went to Nuneham under it with a view to get money on bills he should draw in that name; and on case, the judges held his conviction right; and that if he had used the name of White before he went to Nuneham, it was incumbent on him to prove it.

And see *Rex v. Francis*, *antè*, p. 546.

(20) See *Rex v. Whiley*, p. 551., and *Rex v. Peacock*, *suprà*.

(21) See *Rex v. Marshall*, *Rex v. Whiley*, *antè*, p. 551., and *Rex v. Francis*, *antè*, p. 546.

And though it were taken upon the credit of other names upon the bill or note, not upon the fictitious name. (22)

And though the party had passed for some time by that name. (23)

But a signature in an assumed name will not be a forgery, though the name were assumed for concealment or fraud, if it were not assumed with a view to that transaction, or for a system of which that is part.

Signing a mark in an assumed name, and suffering the assumed name to be ascribed to the mark, is forging the name. (24)

And it makes no difference, though the assumed name be not ascribed to the mark till after the mark is made, if it be ascribed to it in the prisoner's presence. (24)

Procuring a man to forge a bill or note is a capital offence (25):

Procuring to utter, a common law felony only. (25)

Rex v. Shepherd, Michaelmas, 1781. The prisoner bought some things at a silversmith's, and uttered a forged cheque in payment: the silversmith took it as *his* draft, and he knew it. On conviction a doubt was entertained, because as the silversmith gave credit to the prisoner, not to the draft, for he supposed it to be the prisoner's cheque: but on point saved the judges were unanimous the conviction was right.

(22) See Rex v. Hough, post, p. 559.

(23) See Rex v. Whiley, antè, p. 551. Rex v. Francis, antè, p. 546.

(24) See Rex v. Dunn, antè, p. 551.

(25) Rex v. Morris, Pasch. 1814. The prisoner was con-

But procuring to utter, if the person procured were ignorant of the forgery, and therefore free from crime, may make the procurer chargeable for the uttering, and subject him to an indictment capitally on that charge.

Showing a man forged notes to raise a false idea in him of the party's substance, would probably not be an uttering within 2 G. 2.; it has been held not to be an uttering of the sham notes to which 13 G. 3. c. 79. applies. (26)

Nor would the leaving them with him sealed up, under colour that he may take charge of them as being too valuable to be carried about. (26)

To constitute an uttering it probably would not

victed of procuring his wife to utter a forged order for payment of money, and the judges held he could only be punished as for a common law felony; but they held, that had he been found guilty of procuring her to forge it, the offence would have been capital.

(26) *Rex v. Shuckard, Michaelmas, 1811.* Prisoner had two sham notes for paying 550*l.*, but the numbers were in white letters on a black ground, so that they had the appearance of bank notes for 550*l.*; he showed them to J. S. with intent to make him suppose he was a man of fortune, but they were folded up so that the numbers only were visible: he then said he did not like to carry so much property about him, sealed them up in a cover, and delivered them to J. S. that he might take charge of them for the prisoner; the prisoner was afterwards suspected; J. S. opened the cover, discovered what the notes were, and the prisoner was indicted on the 13 G. 3. c. 79. for uttering and publishing them; but on case, the judges held, that what he had done did not amount to an uttering or publishing within the statute, and that the conviction was wrong.

be deemed necessary it should be uttered in payment.

Uttering under the false pretence that it had been given in change by the person to whom it is uttered, in order to obtain from him a good note in lieu thereof, would probably be deemed an uttering; it has been so held in the case of counterfeit coin. (27)

And under 45 G. 3. c. 89., offering, disposing of, or putting away, is described as the offence; uttering is not mentioned.

The offence of disposing of and putting away may be complete, though the person to whom they were disposed of were an agent to detect utterers. (28)

(27) *Rex v. Franks, Leach, 736.* The prisoner sold Redit some apricots, and Redit paid him a good shilling; the prisoner put it into his mouth, and took from thence a counterfeit, and gave it to Redit as the shilling received from him, desiring him to change it; which he did. The prisoner practised the same trick with a second and third good shilling Redit gave him; on which Redit apprehended him. Conviction.—Objection that the indictment did not state that the shilling was uttered as and for a good one; the Court thought an uttering not in payment within the statute, and the indictment right.

(28) *Rex v. Holden, Michaelmas, 1809.* Indictment charged that prisoner disposed of and put away a forged bank note with intent to defraud the Bank, he knowing it at the time to be forged. The evidence was, that Shaw and Whitehead were employed by the magistrates, with the approbation of the agents for the Bank, to detect utterers: that they applied to the prisoner, who procured the notes, and sold them, not as genuine, but as forged: it did not appear by any direct evidence that prisoner had the notes in his possession when first applied to,

And though the prisoner were applied to by such agent for the bill or notes. (28)

And though he might not have had them when the agent first applied. (28)

And though he disposed of them, not as genuine, but as forged. (28)

Giving a confederate a forged bank note that he may utter it, is a disposing and putting away thereof. (29)

Forging or uttering a bill or note for less than 20s., or a bill or note for (30) less than 5*l.* which does not comply with the requisites of 17 G.3. c. 30., or any other bill or note the legislature has

but he produced them at a subsequent meeting. It was urged, 1st, That the indictment was insufficient, as not stating in what manner and to whom the notes were disposed of; and, 2ndly, that the disposal was insufficient, as the prisoner was solicited to commit the act by the Bank's agent: but Chambre J. overruled the objections, and, on case for the twelve judges, they were unanimous that the objections had no weight.

(29) *Rex v. Palmer*, Pasch. 1804. Palmer and Hudson were jointly indicted, 1st, for uttering a forged bank note; and, 2dly, for disposing and putting away: Hudson tendered it in payment, but Palmer was not with her: the shopkeeper stopped it as suspicious, and Palmer came afterwards with Hudson, and claimed it as his, and said he would have either the note or change. The jury found Palmer alone guilty; and seven judges against four, held him well convicted on the second count.

(30) *Rex v. Moffat*, Hil. 1787. Indictment for uttering a forged acceptance on a bill for 3*l.* 3*s.* The bill did not specify the payee's place of abode, and had no subscribing witness, and was therefore void by 17 G.3.; and, on a case reserved, the judges held this not a forgery within 7 G.2.

declared void, is not within the statutes against forgery.

But a bill or note for payment of so many pound, instead of pounds, is. (31)

And so is a bill or note for payment of ten, twenty, thirty, &c. omitting "Pounds," if the figures with an *£*. affixed be put upon it to denote the amount. (32)

And so is a bill on the commissioners of the navy, though it be not warranted by 35 G. 3. c. 94., if it have the requisites of a bill of exchange. (33)

(31) See *Rex v. Post*, antè, p. 11.

(32) *Rex v. Eliot, Michaelmas, 1777*. The prisoner was found guilty of forging this note, "^{No.} 17.37 I promise to pay to Mr. Jos. Crook, or bearer, on demand, the sum of fifty, London, the 20th day of June. For the governor and company of the Bank of England. Tho^s. Thompson. *£*Fifty. Entered C. Blewerse." One count called it a note for payment of money only, describing it, however, as for payment of fifty pounds, and setting out the tenor: on the trial, the judge left it to the jury whether it was not to be considered as for 50*l*. The prisoner was found guilty, and, on case, the judges were unanimous of opinion the conviction was right.

(33) *Rex v. Chisholme, Pasch. 1815*. Prisoner was convicted of uttering a bill on the commissioners of the navy for 22*l*. 6*s*. 9*d*., for pay due to J. S. as acting lieutenant of the *Zealous*. Acting lieutenants have no power under 35 G. 3. to draw, and it was admitted, therefore, that the indictment could not be maintained on 35 G. 3.; it was urged, that it could not be deemed a bill of exchange, because the commissioners of the navy were removable, and the instrument, if genuine, would not have been drawn for the purpose of being accepted by the commissioners, but in order to obtain an assignment under 35 G. 3.; but the judges, on case, held, that it was, in form, a bill of exchange, and 35 G. 3. would not prevent its being so.

But a bill or note is not within the statutes against forgery, unless it be for payment of money in specie (34);

And at all events.

Therefore, a bill or note to pay in cash or bank notes is not within those statutes. (34)

A note to take the same as a given sum in part payment for a money note of higher amount is not such a note the forgery of which will be even a common law misdemeanour, unless it express a consideration upon the face of it. (35)

And it is questionable whether a bill or note payable to _____, or order, leaving a blank for the payee's name, is within the statutes. (36)

Forging or uttering a note without a maker's name is not a capital offence. (36*)

(34) See *Rex v. Wilcox*, *antè*, p. 11.

(35) *Rex v. Burke*, Michaelmas 1822. The prisoner was convicted as of a misdemeanor, in disposing of and putting away the following forged promissory note, knowing it to be forged: "Blackburn Bank. I promise to take this as 1*l.* 10*s.* on demand in part for a 2*l.* note, value received. Blackburn, April 18, 1821. For Cunliffe, Brooks and Co., R. Cunliffe." It was insisted that this could not be deemed a promissory note, and that it had no legal validity; and on case, the judges were clearly of that opinion. It was not a note to pay money, but a promise to take that note in payment; and as the consideration was not expressed, it was *nudum pactum*; and the judges recommended that judgment should be arrested.

(36) See *Rex v. Randall*, *antè*, p. 37.

(36*) *Rex v. Pateman*, Pasch. 1821. Prisoner was convicted of uttering and publishing as true a forged promissory note. The note was as follows: "No. 16,209. Bedford Bank. I pro-

Forging or uttering a bill or note importing to be payable to A. B., or order, is a complete offence, though there be no indorsement upon it in A. B.'s name. (37)

mise to pay the bearer forty pounds on demand, here, or at Sir Charles Price, Baronet, and Co.'s, bankers, London. Value received. Bedford, the 17th day of October, 1817. For Barnard Barnard and Green." It was objected that this was no note, because it had no maker's name, and imported to bind nobody: the point was saved for the consideration of the judges, and they held the objection good, and the conviction wrong.

(37) *Rex v. Birkett*, Pasch. 1805. Indictment for forging and uttering a note payable to the prisoner's order: it appeared that he deposited it for his bill at an inn, unindorsed, with a promise that he would pay the bill in a few days, saying, he wished not to discount it. Conviction. — Doubts, whether it should not have been left to the jury to consider, whether he did not really mean to pay his bill, and get back the note, and make no further use of it. The judges thought not, and the conviction stood.

Rex v. Hough, Michaelmas, 1806. Indictment for uttering a forged bill importing to be drawn by Hastings, payable to Higgins, or order, with intent to defraud Green: the indictment did not state any indorsement in Higgin's name: the prisoner passed it to Green, and Green, at the time, enquired who Hastings and Higgins were, and the prisoner said he did not know much about Hastings, but he spoke of Higgins as a considerable manufacturer, and Green took the bill on the prisoner's representation of Higgins. Sutton B. doubted whether prisoner could properly be convicted, as Green took the bill on the credit of Higgins, and there was nothing in the indictment about his indorsement; but all the other judges thought the conviction right.

Rex v. Wicks, Pasch. 1809. Prisoner uttered a forged bill importing to be payable to the order of the drawers, Rimington and Co.; it had not their indorsement thereon, though it had one indorsement beside prisoner's. On conviction thereon,

Forging on unstamped paper a bill or note which requires a stamp is as much an offence as if it were on stamped paper. (38)

And altering a bill which has once been paid, and which has been reissued without having a new stamp thereon, where such new stamp is requisite, is as much an offence as if the bill had never been paid, or as if it had had the additional stamp. (39)

An intent to defraud the person who would have to pay the bill or note, if it were genuine, is to be inferred. (40)

And this inference ought to be drawn, though, from the manner of executing the forgery, or from that person's ordinary caution, it would not be likely to impose on him. (40)

And though, from its being negotiable, it would be likely to defraud others, before it reached him. (40)

a case was reserved, and on consideration, the judges (nine) held the conviction right; for, the instrument was a bill, and though it would not be available against the drawers without their indorsement, they might be compelled to indorse it, if they passed it away for good consideration. Lawrence J. for some time doubted, but at last seemed satisfied.

(38) See *Rex v. Hawkeswood*, *antè*, p. 80.

(39) See *Rex v. Teague*, *antè*, p. 547.

(40) *Rex v. Mazagora*, Pasch. 1815. On indictment for disposing of forged bank notes, the intent was charged to be to defraud the bank: the jury stated that the intent was to defraud whoever might take the notes, but that the intention of defrauding the Bank in particular did not enter into the prisoner's contemplation, and they found the prisoner guilty. On case, the judges thought it too clear for discussion; that

And though the object were general, to defraud whoever might take the instrument; and the particular intention of defrauding the person who would have to pay it, if genuine, never entered into the prisoner's contemplation. (40)

An intent to defraud a body politic or corporate is equally criminal with an intent to defraud an individual. (41)

And where the forgery would defraud a banking copartnership of more than six, carrying on business under the provisions of 7 G. 4. c. 46., the intent may be laid to have been to injure or defraud any one of the public officers, nominated as the act directs, of such copartnership. (42)

Where the forgery is by alteration, the indictment may charge that the prisoner forged the altered instrument (43); or that he altered by forging: for, altering is forging. (44)

And discharging one indorsement, and inserting another, may be charged as altering the indorsement. (45)

If the bill or note omit the word pounds in the body, but have an £ prefixed to figures denoting

the prisoner must be taken to have intended to defraud the bank, and that the conviction was right.

(41) See 45 G. 3. c. 89. *antè*, p. 545.

(42) 7 G. 4. c. 46. s. 9.

(43) See *Rex v. Teague*, *antè*, p. 547.

(44) See *Rex v. Elsworth*, *antè*, p. 547.

(45) See *Rex v. Birkitt*, *antè*, p. 548.

amount in the margin, it may be described as a bill or note for payment of that amount. (46)

The indictment must set out the bill or note in the very words: it is not sufficient to set out the substance. (47)

And if the bill or note contain figures, the indictment must follow it in that respect. (48)

And if the bill or note be in a foreign language, a translation of it must be set out, that it may appear upon the record, in a language the courts understand, that it is what the law considers a bill or note. (49)

(46) See *Rex v. Elliot*, *antè*, p. 557.

(47) *Rex v. Mason*, Pasch. 1793. Indictment stated that the prisoners, having in their possession a bill of exchange purporting to be drawn by J. S. on J. N., thereby requiring J. N., two months after date, to pay A. B., or order, 91*l.*, and purporting to have been indorsed by A. B., together with a forged acceptance, written on the same bill, and purporting to have been written by the said J. N., feloniously did utter, &c. Thompson B. saved the question, whether the indictment ought not to have set out the bill and acceptance in their words and figures: the judges held it ought, and that for want thereof it was bad.

Note. It would not otherwise appear on the record whether the bill was what the law considers a bill.

(48) See *Rex v. Powell*, *post*, p. 563.

(49) *Rex v. Goldstein*, Michaelmas, 1821. The prisoner was convicted under 43 G. 3. c. 139. of forging a note purporting to be a note of the king of Prussia: the note was in the German language, and was set out verbatim: the indictment did not set out any English translation of it, and on that account an application was made to arrest the judgment: the point was saved for the consideration of the twelve judges; they directed it

Alleging that the prisoner forged a bill or note "as follows," or that he had a bill or note "as follows," implies, that what follows is in the very words of the bill or note, and makes it necessary to prove the bill or note verbatim. (50)

On an indictment for forging a bill or note with a false name ascribed to the prisoner's mark, the words ascribing the name to the mark, if written in the prisoner's presence, may be described as part of the bill or note. (51)

If the false signature contain an initial only for

to be argued, and after argument, the opinion of the majority was, that a translation ought to have been set out upon the indictment; for, it might be a question whether the instrument was within the statute; a court of error ought to have the means of deciding upon that point; to give them those means, they ought to have the instrument before them in a language they understand, and unless they had a translation sanctioned by the jury which tried the indictment, they had no means of getting a translation upon which they could judicially rely: the judgment was arrested.

(50) *Rex v. Powell*, Michaelmas, 1771. Indictment against prisoner for forging a stock receipt with intent to defraud, 1st, Taylor Barrow, and, 2dly, T. Sykes. The indictment stated that the prisoner forged a certain receipt as follows, viz. &c. The receipt, as set out, contained certain sums in figures, and it was signed T. Barrow. Three objections: 1st, That this was not equivalent to setting out the tenor; but, the judges held it was, and that any variance would be fatal: 2dly, That the sums should not have been set out in figures; but, the judges held the receipt must be pursued literatim, or it would be a variance; and, 3dly, That it should have been averred that T. Barrow, as signed, meant Taylor Barrow; but, the judges thought not, and prisoner was executed.

(51) See *Rex v. Dunn*, *antè*, p. 551.

the Christian name, it is not necessary to aver what Christian name it means. (52)

The indictment ought not to describe the bill or note as *signed* by the person whose name is supposed to have been *forged*; such an allegation is inconsistent with the charge of forgery, and makes the indictment bad. (53)

And an indictment must not describe a bill or note as having a purport different from what appears upon the face of the instrument. (54)

On an indictment for forging the indorsement of a payee, it is not necessary to show, by the drawer or maker, who was intended as payee; if there be proof that the prisoner has himself admitted who it was. (55)

(52) See *Rex v. Powell*, ante, p. 563.

(53) *Rex v. Carter*, Hil. 1801. An indictment, for forging and uttering a bill in Hutchinson's name, described it as signed by Hutchinson; and after conviction, the judges held it bad upon the face of it, and that the prisoner might be indicted *de novo*.

(54) *Rex v. Reading*, Hil. 1794. East, 981. Upon a bill directed to John Ring, there was an acceptance in the name of John King. The indictment described the bill as purporting to be directed to John King by the name of John Ring; and after conviction for forging and uttering, the judges held this a repugnant and absurd description, for the bill could only purport to be what it appeared upon the face of it to be; and the judgment was arrested.

S. P. Rex v. Gilchrist, East, 982.; and see *Rex v. Jones*, Dougl. 302. East, 883.

(55) *Rex v. Downs*, Michaelmas, 1789. Indictments for forging the payee's indorsement on a bill, payable to John Sowerby or order; when prisoner passed the bill, he said Sowerby was a cheesemonger at Liverpool, and John Sowerby of Liverpool,

To support a charge of forgery by subscribing a fictitious name, there must be evidence on the part of the prosecution that that is not the party's real name. (56)

And if there be no evidence to show affirmatively what the real name is, there ought to be proof that it was assumed for the transaction in question (56) ;

Or for a system of which that was part. (56)

But if there be affirmative proof of the real name, it is for the prisoner to shew a prior independent use of the assumed name. (56)

And in such case an absence of proof, on the part of the prosecution, of the name by which the prisoner has passed for several years will not be material. (56)

On an indictment for uttering, proof that the prisoner had in his possession other bills or notes ejusdem generis is admissible ; because, if unexplained, it tends to show that he knew the bill or note in question was a forgery. (57)

cheesemonger, was called ; who proved that there was no other cheesemonger at Liverpool of that name but himself, and that the indorsement was not his ; there were letters from prisoner after his apprehension implying guilt generally in this transaction. It was urged, that the drawer should have been called to prove what John Sowerby he meant ; but Wilson J. left the case as it was to the jury, who convicted : and on a case reserved, the judges thought the evidence sufficient to go to the jury, and that the conviction was right.

(56) See *Rex v. Peacock*, *antè*, p. 552.

(57) *Rex v. Hough*, *Michaelmas*, 1806. Indictment for uttering a forged bill, purporting to be drawn by Hastings on

And bills on the same house with a bill in question, importing to be drawn by persons not known at that house, will be deemed *ejusdem generis* with the bill in question. (57)

And proof that the prisoner had pointed out where bills or notes *ejusdem generis* were hidden, is admissible; because, if unexplained, it raises a presumption that he had them in his possession, and had hidden them. (58)

So, proof that he had uttered other bills or notes *ejusdem generis* is also admissible. (59)

Esdailles, and proof that no such person as Hastings kept cash at Esdailes': when the prisoner was apprehended, which was four months after the uttering, there were found upon him two other bills, importing to be drawn by Walters on Esdaile, and another, importing to be drawn by Newman on Esdaile; and evidence was given that no such person as Walters or Newman kept cash at Esdailes': Sutton B. allowed these bills to be read as evidence that prisoner knew the bill he uttered to be forged: and after conviction the judges thought it right.

(58) *Rex v. Rowley*, Pash. 1806. Waring, a person employed by the solicitor to the Bank, applied to the prisoner, who twice procured him forged bank notes: he applied a third time; prisoner went out, and after some time returned, and told Waring they were in an old shoe, in a particular lane; they went together, and prisoner threw a stone into a bush, and said, there they are: Waring found the shoe there, and the notes in it: the prisoner was indicted, on 45 G. 3. c. 89. § 6., for having these notes in his possession, and Graham B. told the jury that if prisoner had the notes in his possession on their passage to the shoe it was sufficient, and they convicted prisoner: the judges held the conviction right.

(59) *Rex v. Wylie*, 1 New Rep. 92. Upon an indictment for uttering a forged bank note, knowing, &c. the uttering was proved, and its being forged; and to prove the knowledge, evi-

But such bills or notes must be produced, and their being forgeries, proved. (60)

Proof that the prisoner took them back and changed them with the word "forged" written thereon, is not sufficient. (60)

dence was offered that the prisoner had passed other forged notes: this was objected to, on the ground that it was evidence of other felonies, and the prisoner could not be prepared to resist it; but Lord Ellenborough, Heath J., and Thompson B., held it admissible, and the prisoner was found guilty.

Rex v. Ball, Michaelmas, 1807, P. C. 1 Campb. 324. P. C. On indictment for uttering a forged bank note, evidence was given that, three months before, prisoner had passed another note, forged in the same manner, namely, with a camel-hair pencil, by the same hand, and with the same materials, and that fifteen other notes of the same fabrication had been found filed at the Bank with the prisoner's writing thereon: point saved, whether the evidence was admissible: all the judges, except Chambre J., thought it was, though its weight would depend on the number of notes issued, and the time, and the probability, from the prisoner's situation in life, of his taking them in business.

See *Rex v. Hough*, *antè*, p. 559.

(60) *Rex v. Millard, Pasch. 1813.* The prisoner was tried for uttering a 5*l.* bank note, and to prove the guilty knowledge evidence was received that he had before uttered } two 1*l.* Leicester notes; that in about a fortnight, one having been objected to as bad, he changed it, and that when under charge for the uttering in question, the other was brought to him with the word "forged" upon it, and he changed that; but neither of these bills were produced, nor had any notice been given for producing them: on case, the judges held that this evidence should not have been admitted, without proper proof that these notes were forged; and without deciding whether bills of a different description and denomination were admissible (*Lc Blanc J.* thought they were), an application for a pardon was recommended.

And evidence may be given of the prisoner's conduct on such other utterings, and that he passed by different names. (61)

But other evidence to impeach his conduct on those occasions is not admissible ; because, he cannot be expected to be ready to meet it. (62)

Proof that the prisoner had uttered other forged bills or notes of a different kind has been thought questionable ; but such evidence is now continually admitted : for, though there may be a considerable difference between the genuine bills of different houses, the forgeries upon many of them probably come from the same hand ; and showing that a man has uttered forged notes of different descriptions raises a presumption that he is in the habit of procuring forged notes, and that he had the criminal knowledge the indictment imputes to him.

(61) See *Rex v. Millard*, *antè*, p. 567.

(62) *Rex v. Ward*, O. B. September, 1818. Prisoner was indicted for uttering, in the name of Ward, a forged 1*l.* note. Evidence was offered that shortly before she had paid away a similar forged note in the name of Sharp : it was insisted that, though it was competent to prove that she had uttered similar notes, it was not competent to show that she uttered them under a different name ; because, she could not be prepared to meet that transaction. Graham B., Bayley and Burrough Js. thought the whole of the prisoner's conduct when she uttered the former note admissible, but they seemed to think that evidence to impeach that conduct, and thereby to raise an inference of guilt was not admissible ; because, the prisoner could not be expected to meet that evidence, and it would introduce the trial of a distinct case.

On indictments for forgery, the person whose name was forged, or upon whose genuine name a forgery was committed, was heretofore, in many instances, deemed an incompetent witness to prove the forgery, upon the ground of his having an interest in the destruction of the instrument supposed to be forged.

But the law is now altered by 9 G. 4. c. 32. s. 2., and such person is, in all cases, deemed a competent witness. (63)

(63) By 9 G. 4. c. 32. s. 1, 2., "Whereas it is expedient that in prosecutions for forgery the party interested should be rendered a competent witness; be it enacted, That on any prosecution by indictment or information, either at common law or by virtue of any statute, against any person for forging any deed, writing, instrument, or other matter whatsoever; or for uttering or disposing of any deed, &c. knowing the same to be forged; or for being accessory, before or after the fact, to any such offence, if the same be a felony; or for aiding, abetting, or counselling the commission of any such offence, if the same be a misdemeanor; no person shall be deemed to be an incompetent witness in support of any such prosecution by reason of any interest which such person may have or be supposed to have in respect of such deed, writing, instrument or other matter."

APPENDIX.

7 GEO. 4. c. 46.

An Act for the better regulating Copartnerships of certain Bankers in England ; and for amending so much of an Act of the Thirty-ninth and Fortieth Years of the Reign of His late Majesty King George the Third, intituled " An Act for establishing an Agreement with the Governor and Company of the Bank of England, for advancing the Sum of Three Millions towards the Supply for the Service of the Year One thousand eight hundred," as relates to the same. [26th May 1826.]

WHEREAS an act was passed in the thirty-ninth and fortieth years of the reign of His late Majesty King George the Third, intituled " An Act for establishing an agreement with the Governor and Company of the Bank of England, for advancing the sum of three millions towards the supply for the service of the year one thousand eight hundred : " and whereas it was, to prevent doubts as to the privilege of the said Governor and Company, enacted and declared in the said recited act, that no other bank should be erected, established, or allowed by Parliament ; and that it should not be lawful for any body politic or corporate whatsoever, erected or to be erected, or for any other persons united or to be united in covenants or partnership, exceeding the number of six persons, in that part of Great Britain called England, to borrow, owe, or take up any sum or sums of money on their bills or notes payable on demand, or at any less

39 & 40 G. 3.
c. 28.

time than six months from the borrowing thereof, during the continuance of the said privilege to the said Governor and Company, who were thereby declared to be and remain a corporation, with the privilege of exclusive banking, as before recited; but subject nevertheless to redemption on the terms and conditions in the said act specified: and whereas the Governor and Company of the Bank of England have consented to relinquish so much of their exclusive privilege as prohibits any body politic or corporate, or any number of persons exceeding six, in England, acting in copartnership, from borrowing, owing, or taking up any sum or sums of money on their bills or notes payable on demand, or at any less time than six months from the borrowing thereof; provided that such body politic or corporate, or persons united in covenants or partnerships, exceeding the number of six persons in each copartnership, shall have the whole of their banking establishments and carry on their business as bankers at any place or places in England exceeding the distance of sixty-five miles from London, and that all the individuals composing such corporations or copartnerships, carrying on such business, shall be liable to and responsible for the due payment of all bills and notes issued by such corporations or copartnerships respectively: be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, That from and after the passing of this act it shall and may be lawful for any bodies politic or corporate erected for the purposes of banking, or for any number of persons united in covenants or copartnership, although such persons so united or carrying on business together shall consist of more than six in number, to carry on the trade or business of bankers in England, in like manner as copartnerships of bankers consisting of not more than six persons in number may lawfully do; and for such bodies politic

Copartnerships of more than six in number may carry on business as bankers in England, sixty-five miles from London, provided they have no establishment as bankers in London, and that every member shall be

or corporate, or such persons so united as aforesaid, to make and issue their bills or notes at any place or places in England exceeding the distance of sixty-five miles from London, payable on demand, or otherwise, at some place or places specified upon such bills or notes, exceeding the distance of sixty-five miles from London, and not elsewhere, and to borrow, owe, or take up any sum or sums of money on their bills or notes so made and issued at any place or places as aforesaid: provided always, that such corporations or persons carrying on such trade or business of bankers in copartnership shall not have any house of business or establishment as bankers in London, or at any place or places not exceeding the distance of sixty-five miles from London; and that every member of any such corporation or copartnership shall be liable to and responsible for the due payment of all bills and notes which shall be issued, and for all sums of money which shall be borrowed, owed, or taken up by the corporation or copartnership of which such person shall be a member, such person being a member at the period of the date of the bills or notes, or becoming or being a member before or at the time of the bills or notes being payable, or being such member at the time of the borrowing, owing, or taking up of any sum or sums of money upon any bills or notes by the corporation or copartnership, or while any sum of money on any bills or notes is owing or unpaid, or at the time the same became due from the corporation or copartnership; any agreement, covenant, or contract to the contrary notwithstanding.

liable for the
payment of all
bills, &c.

§ 2. Provided always, and be it further enacted, That nothing in this act contained shall extend or be construed to extend to enable or authorize any such corporation or copartnership exceeding the number of six persons, so carrying on the trade or business of bankers as aforesaid, either by any member of or person belonging to any such corporation or copartnership, or by any agent or

This act not to
authorize co-
partnerships to
issue, within the
limits mention-
ed, any bills
payable on de-
mand; nor to
draw bills upon
any partner,

&c. so resident,
for less than
50*l*.;

agents, or any other person or persons on behalf of any such corporation or copartnership, to issue or re-issue in London, or at any place or places not exceeding the distance of sixty-five miles from London, any bill or note of such corporation or copartnership, which shall be payable to bearer or demand, or any bank post bill; nor to draw upon any partner or agent, or other person or persons who may be resident in London, or at any place or places not exceeding the distance of sixty-five miles from London, any bill of exchange which shall be payable on demand, or which shall be for a less amount than fifty pounds: provided also, that it shall be lawful, notwithstanding any thing herein or in the said recited act contained, for any such corporation or copartnership to draw any bill of exchange for any sum of money amounting to the sum of fifty pounds or upwards, payable either in London or elsewhere, at any period after date or after sight.

nor to borrow
money, or take
up or issue
bills of ex-
change, con-
trary to the
provisions of the
recited act, ex-
cept as herein
provided.

§ 3. Provided also, and be it further enacted, That nothing in this act contained shall extend or be construed to extend to enable or authorize any such corporation, or copartnership exceeding the number of six persons, so carrying on the trade or business of bankers in England as aforesaid, or any member, agent or agents of any such corporation or copartnership, to borrow, owe, or take up in London, or at any place or places not exceeding the distance of sixty-five miles from London, any sum or sums of money on any bill or promissory note of any such corporation or copartnership payable on demand, or at any less time than six months from the borrowing thereof, nor to make or issue any bill or bills of exchange or promissory note or notes of such corporation or copartnership contrary to the provisions of the said recited act of the thirty-ninth and fortieth years of King George the Third, save as provided by this act in that behalf: provided also, that nothing herein contained shall extend or be construed to extend

to prevent any such corporation or copartnership, by any agent or person authorized by them, from discounting in London, or elsewhere, any bill or bills of exchange not drawn by or upon such corporation or copartnership, or by or upon any person on their behalf.

§ 4. And be it further enacted, That before any such corporation, or copartnership exceeding the number of six persons, in England, shall begin to issue any bills or notes, or borrow, owe, or take up any money, on their bills or notes, an account or return shall be made out, according to the form contained in the Schedule marked (A.) to this Act annexed, wherein shall be set forth the true names, title, or firm of such intended or existing corporation or copartnership, and also the names and places of abode of all the members of such corporation, or of all the partners concerned or engaged in such copartnership, as the same respectively shall appear on the books of such corporation or copartnership, and the name or firm of every bank or banks established or to be established by such corporation or copartnership, and also the names and places of abode of two or more persons, being members of such corporation or copartnership, and being resident in England, who shall have been appointed public officers of such corporation or copartnership, together with the title of office or other description of every such public officer respectively, in the name of any one of whom such corporation shall sue and be sued as hereinafter provided, and also the name of every town and place where any of the bills or notes of such corporation or copartnership shall be issued by any such corporation, or by their agent or agents; and every such amount [account] or return shall be delivered to the commissioners of stamps, at the Stamp Office in London, who shall cause the same to be filed and kept in the said Stamp Office, and an entry and registry thereof to be made in a book or books to be there kept for that purpose by some person or persons to be appointed by the said com-

Such copartnerships shall, before issuing any notes, &c. deliver at the Stamp Office in London an account containing the name of the firm, &c.

missioners in that behalf, and which book or books any person or persons shall from time to time have liberty to search and inspect on payment of the sum of one shilling for every search.

Account to be
verified by
secretary.

§ 5. And be it further enacted, That such account or return shall be made out by the secretary or other person, being one of the public officers appointed as aforesaid, and shall be verified by the oath of such secretary or other public officer, taken before any justice of the peace, and which oath any justice of the peace is hereby authorized and empowered to administer; and that such account or return shall, between the twenty-eighth day of February and the twenty-fifth day of March in every year, after such corporation or copartnership shall be formed, be in like manner delivered by such secretary or other public officer as aforesaid to the commissioners of stamps, to be filed and kept in the manner and for the purposes as hereinbefore mentioned.

Certified copies
of returns to be
evidence of the
appointment of
the public offi-
cers, &c.

§ 6. And be it further enacted, That a copy of any such account or return so filed or kept and registered at the Stamp Office as by this act is directed, and which copy shall be certified to be a true copy under the hand or hands of one or more of the commissioners of stamps for the time being, upon proof made that such certificate has been signed with the handwriting of the person or persons making the same, and whom it shall not be necessary to prove to be a commissioner or commissioners, shall in all proceedings, civil or criminal, and in all cases whatsoever, be received in evidence as proof of the appointment and authority of the public officers named in such account or return, and also of the fact that all persons named therein as members of such corporation or copartnership were members thereof at the date of such account or return.

Commissioners
of stamps to
give certified
copies of affi-

§ 7. And be it further enacted, That the said commissioners of stamps for the time being shall, and they are hereby required, upon application made to them by any

person or persons requiring a copy certified according to this act, of any such account or return as aforesaid, in order that the same may be produced in evidence or for any other purpose, to deliver to the person or persons so applying for the same such certified copy, he, she, or they paying for the same the sum of ten shillings and no more.

debits, on payment of 10s.

§ 8. Provided also, and be it further enacted, that the secretary or other officer of every such corporation or copartnership shall, and he is hereby required, from time to time, as often as occasion shall render it necessary, make out upon oath, in manner hereinbefore directed, and cause to be delivered to the commissioners of stamps as aforesaid, a further account or return, according to the form contained in the schedule marked (B) to this act annexed, of the name or names of any person or persons who shall have been nominated or appointed a new or additional public officer or public officers of such corporation or copartnership, and also of the name or names of any person or persons who shall have ceased to be members of such corporation or copartnership, and also of the name or names of any person or persons who shall have become a member or members of such corporation or copartnership, either in addition to or in the place or stead of any former member or members thereof, and of the name or names of any new or additional town or towns, place or places, where such bills or notes are or are intended to be issued, and where the same are to be made payable; and such further accounts or returns shall from time to time be filed and kept, and entered and registered at the Stamp Office in London, in like manner as is hereinbefore required with respect to the original or annual account or return hereinbefore directed to be made.

Account of new officers or members in the course of any year to be made.

§ 9. And be it further enacted, that all actions and suits, and also all petitions to found any commission of bankruptcy against any person or persons, who may be

Copartnerships shall sue and be sued in the name of their public officers.

at any time indebted to any such copartnership carrying on business under the provisions of this act, and all proceedings at law or in equity under any commission of bankruptcy, and all other proceedings at law or in equity, to be commenced or instituted for or on behalf of any such copartnership against any person or persons, bodies politic or corporate, or others, whether members of such copartnership or otherwise, for recovering any debts or enforcing any claims or demands due to such copartnership, or for any other matter relating to the concerns of such copartnership, shall and lawfully may, from and after the passing of this act, be commenced or instituted and prosecuted in the name of any one of the public officers nominated as aforesaid for the time being of such copartnership, as the nominal plaintiff or petitioner for and on behalf of such copartnership; and that all actions or suits, and proceedings at law or in equity, to be commenced or instituted by any person or persons, bodies politic or corporate, or others, whether members of such copartnership or otherwise, against such copartnership, shall and lawfully may be commenced, instituted, and prosecuted against any one or more of the public officers nominated as aforesaid for the time being of such copartnership, as the nominal defendant for and on behalf of such copartnership; and that all indictments, informations, and prosecutions by or on behalf of such copartnership, for any stealing or embezzlement of any money, goods, effects, bills, notes, securities, or other property of or belonging to such copartnership, or for any fraud, forgery, crime, or offence committed against or with intent to injure or defraud such copartnership, shall and lawfully may be had, preferred, and carried on in the name of any one of the public officers nominated as aforesaid for the time being of such copartnership; and that in all indictments and informations to be had or preferred by or on behalf of such copartnership against any person or persons whomsoever, notwithstanding such person or persons may happen to be

a member or members of such copartnership, it shall be lawful and sufficient to state the money, goods, effects, bills, notes, securities, or other property of such copartnership, to be the money, goods, effects, bills, notes, securities, or other property of any one of the public officers nominated as aforesaid for the time being of such copartnership; and that any forgery, fraud, crime, or other offence committed against or with intent to injure or defraud any such copartnership, shall and lawfully may in such indictment or indictments, notwithstanding as aforesaid, be laid or stated to have been committed against or with intent to injure or defraud any one of the public officers nominated as aforesaid for the time being of such copartnership; and any offender or offenders may thereupon be lawfully convicted for any such forgery, fraud, crime, or offence; and that in all other allegations, indictments, informations, or other proceedings of any kind whatsoever, in which it otherwise might or would have been necessary to state the names of the persons composing such copartnership, it shall and may be lawful and sufficient to state the name of any one of the public officers nominated as aforesaid for the time being of such copartnership; and the death, resignation, removal, or any act of such public officer, shall not abate or prejudice any such action, suit, indictment, information, prosecution, or other proceeding commenced against or by or on behalf of such copartnership, but the same may be continued, prosecuted, and carried on in the name of any other of the public officers of such copartnership for the time being.

§ 10. And be it further enacted, that no person or persons, or body or bodies politic or corporate, having or claiming to have any demand upon or against any such corporation or copartnership, shall bring more than one action or suit, in case the merits shall have been tried in such action or suit, in respect of such demand; and the proceedings in any action or suit, by or against

Not more than
one action for
the recovery of
one demand.

any one of the public officers nominated as aforesaid for the time being of any such copartnership, may be pleaded in bar of any other action or actions, suit or suits, for the same demand, by or against any other of the public officers of such copartnership.

Decrees of a court of equity against the public officer to take effect against the copartnership.

§ 11. And be it further enacted, that all and every decree or decrees, order or orders, made or pronounced in any suit or proceeding in any court of equity against any public officer of any such copartnership carrying on business under the provisions of this act, shall have the like effect and operation upon and against the property and funds of such copartnership, and upon and against the persons and property of every or any member or members thereof, as if every or any such members of such copartnership were parties members before the court to and in any such suit or proceeding; and that it shall and may be lawful for any court in which such order or decree shall have been made, to cause such order and decree to be enforced against every or any member of such copartnership, in like manner as if every member of such copartnership were parties before such court to and in such suit or proceeding, and although all such members are not before the court.

Judgments against such public officer shall operate against the copartnership.

§ 12. And be it further enacted, that all and every judgment and judgments, decree or decrees, which shall at any time after the passing of this act be had or recovered or entered up as aforesaid, in any action, suit, or proceedings in law or equity against any public officer of any such copartnership, shall have the like effect and operation upon and against the property of such copartnership, and upon and against the property of every such member thereof as aforesaid, as if such judgment or judgments had been recovered or obtained against such copartnership; and that the bankruptcy, insolvency, or stopping payment of any such public officer for the time being of such copartnership, in his individual character or capacity, shall not be nor be construed to be the bankruptcy, insolvency, or stopping payment of such

copartnership; and that such copartnership and every member thereof, and the capital stock and effects of such copartnership, and the effects of every member of such copartnership, shall in all cases, notwithstanding the bankruptcy, insolvency, or stopping payment of any such public officer, be attached and attachable, and be in all respects liable to the lawful claims and demands of the creditor and creditors of such copartnership, or of any member or members thereof, as if no such bankruptcy, insolvency, or stopping payment of such public officer of such copartnership had happened or taken place.

§ 13. And be it further enacted, that execution upon any judgment in any action obtained against any public officer for the time being of any such corporation or copartnership carrying on the business of banking under the provisions of this act, whether as plaintiff or defendant, may be issued against any member or members for the time being of such corporation or copartnership; and that in case any such execution against any member or members for the time being of any such corporation or copartnership shall be ineffectual for obtaining payment and satisfaction of the amount of such judgment, it shall be lawful for the party or parties so having obtained judgment against such public officer for the time being to issue execution against any person or persons who was or were a member or members of such corporation or copartnership at the time when the contract or contracts or engagement or engagements in which such judgment may have been obtained was or were entered into, or became a member at any time before such contracts or engagements were executed, or was a member at the time of the judgment obtained: provided always, that no such execution as last mentioned shall be issued without leave first granted, on motion in open court, by the court in which such judgment shall have been obtained, and when motion shall be made on notice to the person or persons sought to be charged, nor after the expiration of

Execution upon judgment may be issued against any member of the copartnership.

three years next after any such person or persons shall have ceased to be a member or members of such corporation or copartnership.

Officer, &c. in such cases indemnified.

§ 14. Provided always, and be it further enacted, that every such public officer in whose name any such suit or action shall have been commenced, prosecuted, or defended, and every person or persons against whom execution upon any judgment obtained or entered up as aforesaid in any such action shall be issued as aforesaid, shall always be reimbursed and fully indemnified for all loss, damages, costs, and charges, without deduction, which any such officer or person may have incurred by reason of such execution, out of the funds of such copartnership, or in failure thereof, by contribution from the other members of such copartnership, as in the ordinary cases of copartnership.

Governor and company of the Bank of England may empower agents to carry on banking business at any place in England.

§ 15. And to prevent any doubts that might arise whether the said governor and company, under and by virtue of their charter, and the several acts of parliament which have been made and passed in relation to the affairs of the said governor and company, can lawfully carry on the trade or business of banking, otherwise than under the immediate order, management, and direction of the court of directors of the said governor and company; be it therefore enacted, that it shall and may be lawful for the said governor and company to authorize and empower any committee or committees, agent or agents, to carry on the trade and business of banking, for and on behalf of the said governor and company, at any place or places in that part of the United Kingdom called England, and for that purpose to invest such committee or committees, agent or agents, with such powers of management and superintendence, and such authority to appoint cashiers and other officers and servants as may be necessary or convenient for carrying on such trade and business as aforesaid; and for the same purpose to issue to such committee or committees, agent or

agents, cashier or cashiers, or other officer or officers, servant or servants, cash, bills of exchange, bank post bills, bank notes, promissory notes, and other securities for payment of money: provided always, that all such acts of the said governor and company shall be done and exercised in such manner as may be appointed by any bye laws, constitutions, orders, rules, and directions from time to time hereafter to be made by the general court of the said governor and company in that behalf, such bye laws not being repugnant to the laws of that part of the United Kingdom called England; and in all cases where such bye laws, constitutions, orders, rules, or directions of the said general court shall be wanting, in such manner as the governor, deputy governor, and directors, or the major part of them assembled, wherof the said governor or deputy governor is always to be one, shall or may direct, such directions not being repugnant to the laws of that part of the United Kingdom called England; any thing in the said charter or acts of parliament, or other law, usage, matter, or thing to the contrary thereof notwithstanding: provided always, that in any place where the trade and business of banking shall be carried on for and on behalf of the said governor and company of the Bank of England, any promissory note issued on their account in such place shall be made payable in coin in such place as well as in London.

§ 16. And be it further enacted, that if any corporation or copartnership carrying on the trade or business of bankers under the authority of this act, shall be desirous of issuing and re-issuing notes in the nature of bank notes, payable to the bearer on demand, without the same being stamped as by law is required, it shall be lawful for them so to do on giving security by bond to His Majesty, his heirs and successors, in which bond two of the directors, members, or partners of such corporation or copartnership shall be the obligors, together with the cashier or cashiers, or accountant or accountants

Copartnerships
may issue un-
stamped notes,
on giving bond.

employed by such corporation or copartnership, as the said commissioners of stamps shall require; and such bonds shall be taken in such reasonable sums as the duties may amount unto during the period of one year, with condition to deliver to the said commissioners of stamps, within fourteen days after the fifth day of January, the fifth day of April, the fifth day of July, and the tenth day of October in every year, whilst the present stamp duties shall remain in force, a just and true account, verified upon the oaths or affirmations of two directors, members, or partners of such corporation or copartnership, and of the said cashier or cashiers, accountant or accountants, or such of them as the said commissioners of stamps shall require, such oaths or affirmations to be taken before any justice of the peace, and which oaths or affirmations any justice of the peace is hereby authorized and empowered to administer, of the amount or value of all their promissory notes in circulation on some given day in every week, for the space of one quarter of a year prior to the quarter day immediately preceding the delivery of such account, together with the average amount or value thereof according to such account; and also to pay or cause to be paid into the hands of the receivers general of stamp duties in Great Britain, as a composition for the duties which would otherwise have been payable for such promissory notes issued within the space of one year, the sum of seven shillings for every one hundred pounds, and also for the fractional part of one hundred pounds of the said average amount or value of such notes in circulation, according to the true intent and meaning of this act; and on due performance thereof such bond shall be void; and it shall be lawful for the said commissioners to fix the time or times of making such payment, and to specify the same in the condition to every such bond; and every such bond may be required to be renewed from time to time, at the discretion of the said commissioners

or the major part of them, and as often as the same shall be forfeited, or the party or parties to the same, or any of them, shall die, become bankrupt or insolvent, or reside in parts beyond the seas.

§ 17. Provided always, and be it further enacted, that no such corporation or copartnership shall be obliged to take out more than four licences for the issuing of any promissory notes for money payable to the bearer on demand, allowed by law to be re-issued in all for any number of towns or places in England; and in case any such corporation or copartnership shall issue such promissory notes as aforesaid, by themselves or their agents, at more than four different towns or places in England, then, after taking out three distinct licences for three of such towns or places, such corporation or copartnership shall be entitled to have all the rest of such towns or places included in a fourth licence.

No corporation compelled to take out more than four licences.

§ 18. And be it further enacted, that if any such corporation or copartnership exceeding the number of six persons in England shall begin to issue any bills or notes, or to borrow, owe, or take up any money on their bills or notes, without having caused such account or return as aforesaid to be made out and delivered in the manner and form directed by this act, or shall neglect or omit to cause such account or return to be renewed yearly and every year, between the days or times hereinbefore appointed for that purpose, such corporation or copartnership so offending shall, for each and every week they shall so neglect to make such account and return, forfeit the sum of five hundred pounds; and if any secretary or other officer of such corporation or copartnership shall make out or sign any false account or return, or any account or return which shall not truly set forth all the several particulars by this act required to be contained or inserted in such account or return, the corporation or copartnership to which such secretary or other officer so offending shall belong shall for

Penalty on copartnership neglecting to send returns, 500*l*.

Penalties for making false returns.

False oath per-
jury.

every such offence forfeit the sum of five hundred pounds, and the said secretary or other officer so offending shall also for every such offence forfeit the sum of one hundred pounds; and if any such secretary or other officer making out or signing any such account or return as aforesaid shall knowingly and wilfully make a false oath of or concerning any of the matters to be therein specified and set forth, every such secretary or other officer so offending, and being thereof lawfully convicted, shall be subject and liable to such pains and penalties as by any law now in force persons convicted of wilful and corrupt perjury are subject and liable to.

Penalty on co-
partnership for
issuing bills
payable on de-
mand;

§ 19. And be it further enacted, that if any such corporation or copartnership exceeding the number of six persons, so carrying on the trade or business of bankers as aforesaid, shall, either by any member of or person belonging to any such corporation or copartnership, or by any agent or agents, or any other person or persons on behalf of any such corporation or copartnership, issue or re-issue in London, or at any place or places not exceeding the distance of sixty-five miles from London, any bill or note of such corporation or copartnership which shall be payable on demand; or shall draw upon any partner or agent, or other person or persons who may be resident in London, or at any place or places not exceeding the distance of sixty-five miles from London, any bill of exchange which shall be payable on demand, or which shall be for a less amount than fifty pounds; or if any such corporation or copartnership exceeding the number of six persons, so carrying on the trade or business of bankers in England as aforesaid, or any member, agent or agents of any such corporation or copartnership, shall borrow, owe, or take up in London, or at any place or places not exceeding the distance of sixty-five miles from London, any sum or sums of money on any bill or promissory note of any such corporation or copartnership payable on demand, or at any less time

or drawing bills
of exchange
payable on de-
mand, or for
less than 50*l*. ;

or borrowing
money on bills,
except as herein
provided.

than six months from the borrowing thereof, or shall make or issue any bill or bills of exchange or promissory note or notes of such corporation or copartnership contrary to the provisions of the said recited act of the thirty-ninth and fortieth years of King George the Third, save as provided by this act, such corporation or copartnership so offending, or on whose account or behalf any such offence as aforesaid shall be committed, shall for every such offence forfeit the sum of fifty pounds.

§ 20. Provided also, and be it further enacted, that nothing in this act contained shall extend or be construed to extend to prejudice, alter, or affect any of the rights, powers, or privileges of the said governor and company of the Bank of England; except as the said exclusive privilege of the said governor and company is by this act specially altered and varied.

Not to affect the Rights of Bank of England, except as herein specially altered.

§ 21. And be it further enacted, that all pecuniary penalties and forfeitures imposed by this act shall and may be sued for and recovered in His Majesty's Court of Exchequer at Westminster, in the same manner as penalties incurred under any act or acts relating to stamp duties may be sued for and recovered in such court.

Penalties how recovered.

§ 22. And be it further enacted, that this act may be altered, amended, or repealed by any act or acts to be passed in this present session of parliament.

Act may be altered.

SCHEDULES referred to by this Act.

SCHEDULE (A).

RETURN or Account to be entered at the Stamp Office in London, in pursuance of an Act passed in the Seventh Year of the Reign of King George the Fourth, intituled [*here insert the title of this act*], viz.

Firm or name of the banking corporation or copartnership, viz. [*set forth the firm or name.*]

Names and places of abode of all the partners concerned or engaged in such corporation or copartnership, viz. [*set forth all the names and places of abode.*]

Names and places of the bank or banks established by such corporation or copartnership, viz. [*set forth all the names and places.*]

Names and descriptions of the public officers of the said banking corporation or copartnership, viz. [*set forth all the names and descriptions.*]

Names of the several towns and places where the bills or notes of the said banking corporation or copartnership are to be issued by the said corporation or copartnership, or their agent or agents, viz. [*set forth the names of all the towns and places.*]

A. B. of Secretary [*or other officer, describing the office,*] of the above corporation or copartnership, maketh oath and saith, that the above doth contain the name, style, and firm of the above corporation or copartnership, and the names and places of the abode of the several members thereof, and of the banks established by the said corpor-

ation or copartnership, and the names, titles, and descriptions of the public officers of the said corporation or copartnership, and the names of the towns and places where the notes of the said corporation or copartnership are to be issued, as the same respectively appear in the books of the said corporation or copartnership, and to the best of the information, knowledge, and belief of this deponent.

Sworn before me, the day of
at in the county of .
 C. D. Justice of the Peace in
 and for the said County.

SCHEDULE (B).

RETURN or Account to be entered at the Stamp Office in London, on behalf of [*name the corporation or copartnership*] in pursuance of an Act passed in the Seventh Year of the Reign of King George the Fourth, intituled [*insert the Title of this Act*], viz.

Names of any and every new or additional public officer of the said corporation or copartnership; viz.

A. B. in the room of *C. D.* deceased or removed
[*as the case may be*] [*set forth every name*].

Names of any and every person who may have ceased to be a member of such corporation or copartnership; viz. [*set forth every name*.]

Names of any and every person who may have become a new member of such corporation or copartnership, [*set forth every name*.]

Names of any additional towns or places where bills or notes are to be issued, and where the same are to be made payable.

A. B. of _____ secretary [or other officer] of the above-named corporation or copartnership, maketh oath and saith, that the above doth contain the name and place of abode of any and every person who hath become or been appointed a public officer of the above corporation or copartnership, and also the name and place of abode of any and every person who hath ceased to be a member of the said corporation or copartnership, and of any and every person who hath become a member of the said copartnership since the registry of the said corporation or copartnership on the _____ day of _____ last, as the same respectively appear on the books of the said corporation or copartnership, and to the best of the information, knowledge, and belief of this deponent.

Sworn before me, the _____ day of _____
at _____ in the county of _____.
C. D. Justice of the Peace in _____
and for the said county.

ADDENDA.

Refer to pp. 218. 258. et seq.

Where a bill payable at A. is drawn upon persons domiciled at B., and no place is appointed for presentment at A., presentment can only be made at the domicile of the drawees. (1)

And the protest (if necessary) for non-payment must be made where the presentment was made. (1)

(1) Where a bill drawn in America on persons at Liverpool, and payable in London generally, was accepted by persons in London for honor of the drawers, *suprà* protest for non-acceptance, in the following form: — “Accepted *suprà* protest for honor of L. & Co., and will be paid on their account if regularly protested and refused when due,” the Court of King’s Bench held, that the bill was properly presented when due to the drawees at Liverpool, and properly protested there, — the protest was properly made where the bill was presented, and the presentment could not be made at any other place than the residence of the drawees; because no other place was appointed for that purpose. Lord Tenterden C. J., Littledale and Parke Judges, thought the presentment was made necessary by the particular form of the acceptance; because, payment could not be refused until it was demanded; but Bayley J. held it necessary, on the general principle, (established by *Williams v. Germaine*, *antè*, p. 178.) that where a

Refer to p. 353. and p. 456. n. (85.)

The acceptor of a bill is not liable to indemnify an indorser against the cash recovered against the indorser, in an account against him on the bill. (2)

Nor is he liable to him for re-exchange. (2)

Refer to pp. 358, 359. In *Eales v. Dicker*, (Exeter Spring Assizes, 1829,) 1 Mood. & M. 324., which was an action by indorsee against acceptor, the bill being offered as evidence on the count for money had and received, Littledale J. said, he was so decidedly of opinion that it was not evidence of money had and received by the acceptor to the use of the holder, that he would not grant leave to move to enter a verdict: he knew it was

bill is accepted for honor of the drawer, presentment for payment to the drawee is necessary. *Mitchell v. Baring*, 1 Mood. & M. 381.

(2) *Dawson against Morgan*, 9 B. & C. 618. Defendant was the acceptor of a bill payable to the order of the drawer, and indorsed by him to plaintiff, and by plaintiff indorsed to Florance; the bill being dishonored, Florance sued plaintiff, and recovered the amount of the bill, and 20*l.* 0*s.* 6*d.* for costs: but Florance having also recovered judgment against defendant, and having obtained the amount of the bill from him, all but the 20*l.* 0*s.* 6*d.* was returned to plaintiff; the plaintiff thereupon sued defendant for the 20*l.* 0*s.* 6*d.*, and alleged, that defendant was liable to pay it by the usage and custom of merchants. Lord Tenterden though plaintiff not entitled, and nonsuited, and on motion for new trial, observed, that there was no privity between plaintiff and defendant; that there was no obligation on defendant, but what the custom of merchants raised; that that did not give an indorser right to recover re-exchange from the acceptor, much less costs. Rule refused.

sometimes supposed to be evidence to that effect, but he thought it against principle. Verdict for Defendant. A rule to set aside the verdict, as against evidence, was obtained, and made absolute; but no objection was made to the ruling of Littledale J. at the trial.

Page 382. Add to the first paragraph, "And if it be stated, that the proper hand of the master was thereunto subscribed, it will be no variance: these words will be rejected as surplusage." (3)

Page 412. Add to the first paragraph in the chapter, "Except that the holder may prove in respect of a bill or note, although his claim thereon would be barred at law by the statute of limitations, provided it were not so barred when the commission issued." (4)

Refer to pp. 459, 460. The maker of a note,

(3) *Booth v. Grove*, 1 Mood. & M. N. P. C. (Lord Tenterden C.J.)

(4) *Ex parte Ross in re Coles*, 2 Gl. & J. 330. Petitioners, in December, 1824, applied to prove under a commission which issued 10th July, 1810, two promissory notes, both dated 21st May, 1810. The commissioners rejected the proof, on the ground, that more than six years had elapsed since the issuing of the commission, and since the notes became due. On Petition, Leach, Vice-Chancellor, held, that the claim of the petitioner was not barred; because, the commission was a trust for the benefit of all the creditors, and the statute does not run against a trust; and he referred it back to the commissioners to receive the proof. On appeal, Lord Lyndhurst, Chancellor, agreed in opinion with the Vice-Chancellor, and affirmed his order.

indorsed by the payee to a man who afterwards becomes bankrupt, may set off against such note an acceptance of the bankrupt indorsed to the maker of the note before, and taken up by him after, the bankruptcy. (5)

Although, at the time of the bankruptcy, the maker of the note was not holder of the acceptance, and therefore not a creditor of the bankrupt in respect thereof. (5)

Refer to pp. 495. 496. Where a bill is accepted partly for money due from the acceptor to the payee, and partly for money due from J. S. to the payee, and the foundation of the acceptance as to J. S.'s debt is known to the payee to be money the acceptor has in his hands, as receiver of real estates of J. S.'s wife, and the payee afterwards agrees to indemnify the acceptor, as to the latter sum, against any proceedings for it by J. S. and wife; if J. S. and wife afterwards insist upon having that money, and the acceptor pay it them, the acceptor may resist any demand for that sum by the payee. (6)

He is not bound to pay his acceptance, and then resort to his indemnity. (6)

(5) This was decided by the Court of King's Bench, after argument and time to consider, in *Collins v. Jones*, Pasch. 1830, over-ruling *ex parte Hale*, antè, p. 459.

(6) *Carr v. Stephens*, 9 B. & C. 758. Plaintiff had a claim upon defendant for 40*l.*, and upon Harrison for 149*l.* Defendant was receiver of the rents of the real estates of Harrison's wife, and had 300*l.* in hand. Plaintiff drew upon de-

fendant for both these sums, and defendant had Harrison's concurrence, but not his wife's, for accepting the bill : before the bill became due, Harrison and wife insisted that the money should be paid to them : plaintiff agreed to indemnify defendant against any proceedings for the money by Harrison and wife, but defendant afterwards paid their agent, and refused to pay plaintiff : plaintiff sued defendant, and defendant paid into Court what would cover the 40*l*. Lord Tenterden thought him bound to pay the whole, and to resort to his indemnity, but saved the point ; and on rule nisi for nonsuit, and cause shown, he changed his opinion, and the rule was made absolute.

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